Nos. 23, 24 and 34

IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE CEMENT INSTITUTE, *et al.*; AETNA PORTLAND CEMENT COMPANY, *et al.*; BLAINE S. SMITH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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Respondents.

BRIEF FOR THE RESPONDENTS

The respondents on whose behalf this brief is filed consist of The Cement Institute, an unincorporated association, which was organized in August 1929, its president and former secretary (Case No. 23) and other officers and trustees (Case No. 34), and fifty-nine[1] of the seventy-four cement

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The Commission's findings are arranged in paragraphs designated by numbers. Some of the paragraphs contain numerous sub-paragraphs which are designated by letters. Hereafter, in referring to a finding, the numeral will indi ate the paragraph and the letter the sub-paragraph, thus Fdg. 1 (a).

The Statement of Points filed in the court below by the respondents on whose behalf this brief is filed is at R. 16232-16322. The citation of this Statement of Points in this brief means that the error assigned was urged before the court below.

[1] Fifty-seven of these companies are engaged in both the manufacture and sale of cement. Great Lakes and Valley Forge are engaged solely in the manufacture of cement, the product of the former being sold exclusively by Lehigh (Fdg. 1 (z) R. 15967) and the product of the latter being sold exclusively to the non-respondent, Allentown Portland Cement Company (Fdg. 1 (3t) R. 15977). Statement of Points No. 12(b), R. 16241.

manufacturing companies (Case No. 24) in these and the companion cases (Nos. 25, 26, 27, 28, 29, 30, 31, 32 and 33).

We regret the necessity of presenting to this Court a brief of this length but the Commission's brief relies upon all of the Commission's lengthy findings, including a substantial number which were dismissed as irrelevant by the court below, and is written on the erroneous assumption that we do not challenge the findings in any significant respects. We are compelled, therefore, to renew the challenge that we made in the court below to a substantial number of the findings.

Opinion Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R, 16761-16821) is reported in 157 F. (2d) 533.

Statement of the Case

These cases[1] are before this Court on the Federal Trade Commission's petition to review judgments of the Circuit Court of Appeals for the Seventh Circuit entered on October 31, 1946 which set aside an order to cease and desist issued by the Commission on July 17, 1943 against the respondents on whose behalf this brief is filed and fifteen other cement producers.

[1] Hereafter in this brief when reference is made to these cases it will mean cases Nos. 23, 24 and 34.

A. The Complaint.[1]

We accept the statement in the Commission's brief, pages 6-8, as to the complaint except in one important respect. It is stated on page 6 (and again on p. 82) that Count I alleges that "for the last eight years" respondents have maintained a combination, etc. The complaint does not so allege. It alleges that "for more than 8 years last past" respondents have maintained a combination, etc. (R. 48, 218).

The court below pointed out that the complaint was filed July 2, 1937 and that The Cement Institute was organized in August, 1929; that the allegation of the complaint quoted above therefore placed the inception of the alleged conspiracy prior to the organization of the Institute; that "the record shows unmistakably" that the case was tried by the Commission on the theory that this was a continuing conspiracy that had its origin some 25 or 30 years prior to the filing of the complaint; that "the findings themselves strongly indicate that at the time they were drawn the Commission was still proceeding on such theory"; and that it was not until the Commission's brief was filed in the court below that it first took the position that the alleged conspiracy originated in 1929 (R. 16776).

Nowhere in its brief filed in this Court does the Commission question the correctness of the holding of the court below on this point. We take it that it accepts the position that the alleged conspiracy originated with the organization of the Institute in August, 1929.

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[1] By leave of the Circuit Court, in lieu of printing the complaint and separate answers, respondents have prepared and there is included in the printed record a Compilation of Complaint and Answers, R. 1-292, wherein similar answers to the complaint, paragraph by paragraph, are grouped and variations therefrom set out separately. The affirmative defenses begin at R. 254.

B. The Answers.

Separate answers to the complaint were filed by each of the producing respondents[1] and by the Institute, its officers and trustees. The answers, while stressing factual differences, all deny the allegations of understanding, agreement or combination. Many of the answers also contain affirmative defenses describing and explaining the respective practices and policies of the several companies.[2]

C. The Proceedings Before the Commission.

From December 1, 1937 until November 29, 1940, with some short intervals, evidence was taken before a Trial Examiner appointed by the Commission. This evidence consists of about 49,000 pages of oral testimony and over 50,000 pages of exhibits. The hearings proceeded in due course and while the respondents sought to protect their legal and administrative rights, their efforts were thwarted in important respects by inadequate consideration of important motions and by the application of different rules of evidence or procedure to them than had been applied to Commission's counsel (See argument at pp. 234 to 244, below).[1]

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[1] Six affiliated companies filed a joint answer: Arkansas, Colorado, Nebraska, Oklahoma, Three Forks and Union.

[2] The answers are summarized at greater length in respondents' petition in the Circuit Court to review and set aside the order, R. 16138-16232.

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[1] Motions to dismiss the complaint and motions to strike and limit evidence of the Commission were made individually on behalf of each of the respondents at the close of the Commission's case in chief (R. 317-320, 333-355, Resp. Exs. 385-389). These motions were denied without prejudice to their being subsequently renewed and were renewed at the close of the evidence, R. 321-332, 356-361. Motions to strike were granted as to a few exhibits, R. 322.

The Trial Examiner filed his Report upon the Evidence in May 1941[2] and the respondents filed exceptions thereto.[3] Briefs were filed and oral argument was had before the Commission in April and May, 1942. On July 17, 1943 the Commission entered its Findings as to the Facts and Conclusion, its Order to Cease and Desist and other ancillary orders[4] denying all motions of respondents theretofore made and renewed before the Commission.

D. The Findings, Conclusion and Order.

The findings and conclusion consist of 172 printed pages, R. 15961 to 16132.

In order to assist this Court in its consideration of the findings, we have set forth in Appendix B to this brief a list of the numbered findings with record citations, their subject matter, references to our Statement of Points filed in the court below with respect to each, the pages in the Commission's brief and in this brief where each finding is cited and also references to Appendix A to this brief where the evidence on the subject of each finding is digested.

Because of the length of the findings and because of our extensive attack upon their sufficiency and validity, we do not attempt to summarize them here. We do not accept the faithfulness of the Commission's summary of them on pages 8 to 25 of its brief but we do not believe that it will assist this Court to take detailed exceptions to the Commission's summary or to make a summary of our own at this point. We deal with all of the significant findings in detail later.

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[2] R. 15659-15772.

[3] R. 15786-15948; R. Vol. 23.

[4] R. 15957-60.

We do, however, take exception to the statement on page 8 of the Commission's brief which is repeated at a later point (see p. 42) that we challenge only a few findings. As stated above our challenge in the court below was comprehensive and we renew it here.

The Commission's order to cease and desist is directed against the Institute, its officers and agents and seventy-four of the seventy-five corporate respondents.[1] We reproduce it in full text in Appendix C to this brief.

E. Proceedings in the Circuit Court of Appeals.

Respondents' petitions to review and set aside the Commission's order to cease and desist were filed in the Circuit Court on July 26, 1943 (R. 16138). Pursuant to orders of the Circuit Court, respondents filed their statement of points (R. 16232) and a motion to adduce additional evidence (R. 16551) on March 20, 1944. The Circuit Court, in an order dated July 31, 1944, denied respondents' motion to adduce additional evidence without prejudice to its being renewed at the time of the hearing on the merits (R. 16757).

Oral argument was heard before Evans, Major and Kerner, Circuit Judges, on April 30 and before Judges Major and Kerner on May 1 and May 2, 1946. The opinion of the court was delivered on September 20, 1946 by Judge Major, with Judge Kerner concurring, holding that the Commission's order be vacated and set aside (R. 16761-16816). Judge Evans dissented and filed a brief opinion (R. 16816-16821).

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[1] R. 16133 to 16137. The order directs that the case be closed as to respondent Castalia Portland Cement Company without prejudice R. 16137.

On October 31, 1946 orders were entered (1) denying respondents' motion to adduce additional evidence and (2) vacating and setting aside the order to cease and desist issued by the Federal Trade Commission against respondents on July 17, 1943 (R. 16823-24, 16831-32).

F. The Facts.

Respondents have prepared a Topical Digest of the Evidence which is submitted herewith as Appendix A to this brief.[1] The purpose of this Appendix is fairly and succinctly, to make available to this Court the substance of the evidence, arranged by topics, bearing on the issues before this Court. In order to condense the evidence to a manageable size, some selection has been made. But respondents have faithfully endeavored to include all evidence relied on by the Commission in support of the findings, that is, the evidence referred to or quoted by the Commission in its findings and the evidence quoted by Commission counsel in their 474 page brief on the facts heretofore filed before the Commission.

At this point respondents will set forth a few fundamental facts about the industry and its product.

1. The Respondents.

The fifty-nine producing respondents on whose behalf this brief is filed, together with the fifteen other producing

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[1] This Topical Digest of the Evidence was submitted as an appendix to the brief filed by these respondents in the Court of Appeals. It will be cited herein by Volume and page, as follows: App. I, 3-10; App. II, 617-620 etc.

respondents in the companion cases,[1] comprise substantially all of the cement manufacturers in the United States. Their total production constitutes all but a small part of the total cement production of the country.

2. *The Product, its Manufacture and Markets.*[1]

Cement is the binding agent which, when mixed through the agency of water with sand, stone or other such ingredients (called "aggregates"), produces concrete or mortar.[2] It is a perishable product which cannot readily be stored and is therefore produced and bought as needed.

The manufacture of cement is a complicated, expensive process involving between seventy-five and eighty individual operations and it is carried on in highly specialized plants.[3] Respondents' mills represent large capital investments, and the manufacture of cement involves high overhead or fixed costs per barrel of capacity.[4]

Location of Cement Mills and Marketing Areas.

Because of the relatively higher costs of transporting raw materials which are fabricated into cement than the cost of transporting the finished product, the site of a

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[1] The names of all respondents and non-respondents mentioned in the record, together with the abbreviated names by which they are referred to herein, and the location of the mills, silos and packing plants operated by the respective producers are set out in the Foreword to Appendix A, pp. 5 to 16.

[1] Statement of Points Nos. 13(a), 13 and 30, R. 16240-41; 16276-77.

[2] App. I, 32-33.

[3] The manufacturing process is described in detail in App. I, 17-20, 51-59. The manifold operations are shown on Chart I-D at p. 52.

[4] App. I, 59-62.

cement mill is determined primarily on the basis of the location of the important raw materials and not on the location of the consuming market. The latter is one of the secondary factors in determining where a mill will be built.[1] On the date of the complaint, July 2, 1937, the seventy-five producing respondents were operating 144 cement mills and 19 packing plants in 36 states of the United States. The mills, in all but a few instances, are located at the site of the primary raw material, i.e., limestone or shale.[2] Many mills are located near their source of fuel. In each case, however, the location seldom satisfies all of the desired requirements.[3] Packing plants, on the other hand, are invariably located at large points of consumption and bulk cement is shipped by water in large quantities to these points for packaging and sale.[4]

The location of mills and packing plants and their respective ownership on the date of the complaint in July 1937 is shown on the large map in the cover of App. I. The map shows that there are several areas where a number of mills are grouped in close proximity to each other. Notable among these groupings are the Lehigh Valley district in eastern Pennsylvania, the Hudson-Alsen group in New York, the Gas Belt group in Kansas, the LaSalle group in Illinois and the Birmingham group in Alabama.[5]

Cement is not marketed by any mill on a national scale because of high transportation costs[6] and the fact that

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[1] App. I, 62-68.

[2] App. I, 65-67.

[3] App. I, 63, 66-67.

[4] App. I, Chart H-H p. 368. Also brief of respondent Huron, Case No. 27.

[5] See App. I, 425-445; Fdg. 7 (d), R. 15989.

[6] Fdg. 3 (a), R. 15980.

available sources of raw material are scattered throughout the country. The marketing area of each mill is limited by freight and competitive price factors and most mills sell the bulk of their output within a radius of not more than 200 to 300 miles from the mill.[7] This fact is implicit in the findings[8] and is undisputed.

STANDARDIZATION

In *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, 591 (1925), this Court said: "Cement is a thoroughly standardized product." The Commission here finds that: "For many years the minimum specifications for Portland cement have been standardized and all cement has been sold subject to such minimum specifications."[1]

The minimum standards for cement have been steadily increased since standard specifications were introduced by the American Society of Civil Engineers and the American Society for Testing Materials in 1904. The Commission has found that since then the quality of cement has constantly been improved.[2]

To buyers of cement—that is, dealers, contractors, government purchasing agents, etc.—variations of any given brand above the minimum standards are immaterial for practical purposes and no buyer will pay more for one brand of cement than he will for another.[3] The Commission

[7] See App. I, 87-91, Charts I-G to I-K, pp. 92-96.

[8] Fdg. 3 (a), R. 15980.

[1] Fdg. 20 (b), R. 16105; *Cf.* Complaint, Par. Three, R. 41.

[2] Fdg. 20 (b) (d) R. 16105-06; App. I, 20-22.

[3] App. I, 30-31, 204-212.

in its complaint alleges that "a difference in delivered price of only one cent (1¢) a barrel will deflect the business away from one manufacturer to another."[4] In its findings the Commission states that: "A difference in price as small as one cent per barrel may divert business from one seller to another."[5]

The evidence is that the buyer's prime interest is in whether or not the cement he is buying meets the specifications and that no buyer will pay more for one brand than another regardless of variations above the minimum standards.[6] All brands meet or exceed the minimum specifications.[7]

THE BUYERS OF CEMENT.

Cement is customarily sold to building material dealers for resale, to processors who sell ready-mixed concrete, to manufacturers of cement products, such as cement blocks and cement pipes, to contractors, to railroads and to governmental agencies.[1] By far the greater proportion of cement sales, however, has been handled by building material dealers for well over thirty years and the Trial Examiner ruled that there was no evidence to the contrary; that "the main part * * * the substantial part" of the manufacturers' business "is through dealers".[2] The Commission found that

[4] Complaint, Par. Eight, R. 241.
[5] Fdg. 9 (a) R. 16023.
[6] App. I, 30-31, 204-212.
[7] App. I, 20-21.

[1] Fdg. 3 (c); R. 15981.
[2] App. I, 35-36.

dealers constitute "the most important channel of distribution in terms of volume" in periods of "normal business".[3]

There are some 30,000 dealers located in every city, town and hamlet throughout the country. Each dealer is free to handle several brands of cement if he chooses and he normally handles more than one brand. Dealers are wholesale professional buyers who keep well informed of prices and terms of the competing companies soliciting business in their towns and ordinarily there are several cement companies constantly soliciting business in each town.[4]

Buyers who buy cement for delivery at one destination are not in competition with buyers who buy at a different price for delivery at another destination and there is no allegation in the complaint or any finding of injury to competition among buyers.[5]

3. *Cement Pricing Methods.*

The extensive proof and findings as to the methods of pricing employed in this industry at different times and places are stated and argued at later points.[1]

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[3] Fdg. 3 (c), R. 15981. For the percentage of business of the respective respondents sold through dealers, see Chart I-C, App. I, 37.

[4] App. I, 35-36, 121, 220-223; App. IV, 2247-57, 2516-17, 2521.

[5] See the opinion of Judge Major, R. 16813.

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[1] See argument pp. 83-142, below.

4. *The Cement Institute.*[1]

The Institute was organized in August, 1929 by 14 companies in the northeastern part of the United States. Its membership grew to 40 companies in June, 1930 but declined to 20 companies in May, 1931. It went through a dormant period of two years from May, 1931 to its revival in June, 1933 at the time of N. R. A. when, in accordance with the N. I. R. A., it became the vehicle for the submission of a proposed code to N. R. A. It attained its maximum membership of 79 companies in January, 1934. In July, 1937, at the time of the issuance of the complaint, the membership was 76 companies representing about 95% of the productive capacity of the industry.

The Institute has been given an exaggerated importance by the Commission in its findings in an attempt to suggest that it has been functioning actively at all times and that it has participated in marketing practices that are said to be evidence of the nationwide conspiracy charged in the complaint to employ the "multiple basing point system of pricing." In fact, the Institute patterned its activities on the decision of this Court in the first *Cement* case and carried on chiefly freight rate book, specific job contract and statistical services for a majority of its members.

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[1] The evidence respecting the Institute, its purposes and activities is set out in App. III, 1797-2098. There, too, will be found Charts X-A, X-B and XI-A pp. 1799, 1800, 1876 which show graphically the membership and the activities of the Institute. The findings and the issues of fact and law raised thereby, respecting the Institute, together with the evidence of purposes and activities, are argued, pp. 42 to 83, below.

5. Other Matters.

The Commission has offered evidence on and referred in the findings to almost every marketing practice used by cement manufacturers since 1900. These include policies respecting diversion in transit[1] (Fdgs. 12, R. 16055-59), sales to trucks[2] (Fdgs. 11, R. 16045-55), terms and conditions of sale[3] (Fdgs. 14, R. 16065-71), dealer policies and direct and dealer sales[4] (Fdgs. 17, 18, R. 16089-16102), competition with imported cement[5] (Fdgs. 19, R. 16102-04), the Institute statistical service, and company production policies[6] (Fdgs. 15, R. 16071-82) and public relations work[7] (Fdgs. 21, R. 16108-22).

[1] The evidence on this subject is digested in App. III, 1739-1777.

[2] The evidence on this subject is digested in App. III, 1401-1703.

[3] The evidence on this subject is digested in App. IV, 2559-2621.

[4] The evidence on this subject is digested in App. IV, 2247-2558.

[5] The evidence on this subject is digested in App. IV, 2623-2672.

[6] The evidence as to the Institute statistical service is digested in App. III, 1927-2011; as to the other production matters mentioned in Fdg. 15, see App. III, 2126-2151.

[7] The evidence as to this subject is digested in App. III, 2026-2056.

ARGUMENT

I. The scope of judicial review.

Under the provisions of the new Administrative Procedure Act[1] the following questions are presented to this Court by respondents.

1. Questions involving the interpretation of statutory provisions and the interpretation of the meaning of the findings, conclusion and order of the Commission.[2]

The decision of the Circuit Court is grounded on the basic holding that the findings of the Commission as made do not sustain the charge in the complaint and therefore the order under review. Fully one-half of the opinion of Judge Major is devoted to a careful and detailed review of the findings (R. 16770-97). At no point in his brief dissenting opinion does Judge Evans present any argument directed to this basic conclusion of the majority (R. 16816-21).

2. Questions as to whether findings as made are supported by substantial evidence and as to failures to find on material evidence.

Section 10(e) of the Administrative Procedure Act provides that the reviewing court "shall * * * (B) hold unlawful and set aside * * * findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (5) unsupported by substantial evidence * * *" and that "in making the foregoing determinations the court shall review the

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[1] Act of June 11, 1946, Public Law 404, 79th Cong. 2nd Sess., U. S. C. A. Tit. 5, §1009 (e). This Act was approved by the President on June 11, 1946 and Section 10 dealing with Judicial Review became effective September 11, 1946, prior to the date of the decision of the Circuit Court on September 20, 1946.

[2] *Id.* Sec. 10(e).

whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The words "findings" and "conclusions" in the above provision "also mean failure to find or conclude as the law and the record may require."[3]

As to the requirement that review shall be upon "the whole record," the Senate Judiciary Committee had this to say:

> "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."[4]

In the court below we attacked the findings and conclusions of the Commission on a broad front and we renew that attack before this Court.[5] The chief ground of our attack is that the Commission has wholly ignored and has failed to make findings on large quantities of material, credible and uncontradicted evidence in this immense record and that if the Commission had been properly advised of all the evidence and had made findings on this evidence there would be no support for the findings as made. We also point to this same evidence to show that the findings as made are not supported by substantial evidence and in many important instances are directly contrary to the only evidence in the record on the point in question.

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[3] Report of the Senate Committee on the Judiciary on S. 7, S. Rep. No. 752, 79th Cong. 1st Sess. p. 28; Report of the House Committee on the Judiciary on S. 7, H. Rep. No. 1980, p. 44.

[4] S. Rep. No. 752, *supra* note 3. The same statement is made H. Rep. No. 1980, *supra* note 3, p. 46.

[5] See Appendix B to this brief for references to our Statement of Points as to each of the numbered paragraphs of the findings.

This immense record was made at hearings before a Trial Examiner of the Commission and at the close of the hearings, as already noted, it consisted of about 49,000 pages of oral testimony and over 50,000 pages of exhibits. The Trial Examiner's Report Upon the Evidence was wholly inadequate to advise the Commission as to the evidence in this record. It consists of only 114 pages of the printed record (R. 15659-15772) and 36 pages, or almost one-third of the Report, are devoted to formal statements about the complaint, answers and the parties (R. 15659-15694). Confronted with this Report, respondents filed exceptions to it in a volume of 741 pages (R. Vol. 23). The findings as made by the Commission consist of 172 pages of the printed record (R. 15961-16132). The Circuit Court, after a painstaking review of them, properly characterized them as "extremely lengthy, and we might add complicated, and difficult to comprehend" (R. 16770) and at another point stated that "the entire findings are permeated with uncertain and indefinite terms" (R. 16782). Their length grows out of the fact that a very substantial part of them is made up of the quotation of scraps of testimony and excerpts from exhibits and their uncertainty and incomprehensibility, so we think, grows out of the fact that the Commission failed in its proof and particularly in its proof of the combination charged. With this in mind we can well understand what Judge Major meant when he said: "It is difficult to comprehend why the Commission failed or neglected to make a forthright finding as to the combination charged" (R. 16783).

II. The Commission did not find or prove the conspiracy charged and upon which its order is predicated.

A. The Commission Made No Finding of the Conspiracy Charged.[1]

The fundamental charge against the respondents is that they have engaged in a nationwide conspiracy to use and maintain a "multiple basing point system of pricing" for the purpose and with the result of achieving identical prices for cement, thereby restraining competition in price in violation of Section 5 of the Federal Trade Commission Act[2] and discriminating in price in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.[3] The Commission's brief agrees with this view of the fundamental charge (Com. Brief, p. 62). The Commission's brief, however, avoids any clear indication as to when the supposed combination began. This, as will presently be seen, is a highly important question in this case.

The case was tried on the theory that the alleged conspiracy began possibly as early as 1902 or as the Court of Appeals put it "upon the theory that the conspiracy had been in existence for as long as thirty-five years" (R. 16767, see also R. 16776). In keeping with that theory a considerable body of evidence was introduced by the Commission respecting the activities of trade associations that existed in this industry during the period from 1902 to 1919.[4] The Commission made numerous findings which incorporated and were based upon this ancient evidence. Among them was what we think was intended by the Commission to be its

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[1] Statement of Points Nos. 2, 8(e), 9(a) to (h), 12(c), 14, 34(a) to (c), 35-37, R. 16234, 16237-39, 16241-42, 16279.

[2] Complaint, Pars. 4, 5, 7, R. 48, 54-55, 91.

[3] R. 218, 223; see also R. 16761-62.

[4] This evidence is discussed in detail at pp. 26-30, below.

finding of the conspiracy to use the multiple base system charged in the complaint, namely, that the multiple basing point "formula was not evolved and put into operation at one stroke. It came into existence and its territorial application was extended from time to time as a result of understandings and agreements among cement manufacturers" (Fdg. 7 (h), R. 15991-92).

We pass for the moment the broad generality of this finding respecting "understandings and agreements" and the question of its adequacy as against the respondents, most of whom were not even in existence during the period covered,[5] and for purposes of argument accept it as an adequate finding of conspiracy.

As we pointed out in the Court below, however, the main trouble with this finding is that there is no possible connection between the old trade association evidence and the Institute which was organized in August, 1929 or with most of the present respondents; there were wide gaps in time in the evidence—at least 7 years if we count from the dissolution of the Cement Manufacturers Protective Association in 1922 and longer as to most other matters,—with not a scrap of evidence to show what, if anything, happened between 1922 and 1929[6] (See Major, J., R. 16775); moreover, the Commission's evidence of the alleged conspiracy in that early period was substantially the same evidence[7] upon which this Court in *Cement Manufacturers Protective Assn.* v. *United States*, 268 U. S. 588 had decided in 1925 that:

> "The use of basing points for the purpose of computing freight rates appears not to have been

[5] As the Court below said, this "finding refers to cement manufacturers long prior to 1929" (R. 16781).

[6] This is shown more fully below, p. 29.

[7] This is shown more fully below, p. 29.

> the result of any collective activity on the part of defendants or cement manufacturers generally, nor were they arbitrarily selected. Their use is rather the natural result of the development of the business within certain defined geographical areas" (at p. 598).

In the face of this argument the Commission abandoned its theory of a thirty-five year continuing conspiracy in the review proceedings in the Court of Appeals. In that court the Commission shifted to the position, as stated by the court below, that "The conspiracy charged came into existence with the organization of the Institute" (R. 16767). In other words, in August, 1929.

Having abandoned its theory of a conspiracy beginning in the early 1900's, the Commission perforce abandoned the only finding upon which to predicate the existence of a conspiracy respecting the use of the multiple basing point system.

It is this state of affairs which compelled counsel for the Commission in the Court below to resort to the several ingenious alternative arguments as to the existence of a finding of combination which are referred to in Judge Major's opinion and which prompted his comment on the "weakness" of their position (R. 16784).

The foregoing explanation makes clear the dilemma facing Commission counsel in this Court and explains the absence of any forthright statement as to the period of time covered by the supposed combination. In part it reaffirms that the combination began in August 1929,[8] yet relies

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[8] The Commission's brief explains the complaint, which was filed in July 1937, as alleging a combination "for the last eight years" (p. 6) whereas the complaint actually charged a combination "for more than eight years last past" (p. 48).

upon the findings as a whole, including the ancient evidence and the findings based upon it is arguing[9] the question of the existence of a finding of combination.

The Commission's brief suggests that a finding of combination can be spelled out of certain "general" findings and the "conclusion" of the Commission or that it may be inferred from certain specific findings regarding collective action by some of the respondent's at various times. This is substantially the same argument made to the court below with one important difference i.e. the Commission has apparently abandoned its reliance upon Paragraph 22 (c) of the findings which sets out certain economic hypothesis based on the testimony of expert witnesses. This is one of the paragraphs upon which Commission counsel placed their "chief reliance" in the Court of Appeals (R. 16782).[10]

The Government's argument as to the existence of a finding of combination amounts to the alternative assertions that (1) because the complaint charged a combination and because the conclusion of the Commission referred to an "aforesaid" combination and because the order is based on combination, the Commission must have made a finding of the combination; or (2) that if it failed to do so, the findings, taken as a whole support an inference of the existence of the combination. The first part of this argument rests largely upon Paragraph 26 of the findings (R. 16131-32).

Here the Commission "concludes" and assumes that the combination has already been found somewhere else "in the manner aforesaid" in connection with "the acts and practices performed thereunder * * * as set out herein".

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[9] Com. Br., pp. 10-12, 19, 29 (No. 5), 32 (E), 45, 60, 64.

[10] This finding is mentioned in the Commission's brief here only at pages 15-16 in its summary of the findings.

In fact the Commission's brief concedes this by its assertion that "This (par. 26) constitutes a finding of combination • • • the nature of which is denoted by reference to the *prior findings* • • •" (p. 64, italics ours). The relation back is all the more plain when taken in the original setting of the Commission's then theory of conspiracy having its inception in 1902, and the plain finding of that early conspiracy among unnamed cement manufacturers in Paragraph 7(h) of the findings (R. 15991-92) heretofore referred to. The Court of Appeals agreed with this position, but went further and correctly pointed out that, even assuming that Fdg. 26 could be construed as a finding of combination, the "manner aforesaid" and "the acts and practices" referred to, covered the ancient evidence, the NIRA evidence, opinion evidence and other incompetent evidence, as well as the many vague and uncertain findings which were applicable only to some respondents without naming them (R. 16783-84).

The alternative argument is equally vulnerable for the same reasons. Moreover, if an inference of combination could have been spelled out of the numerous and complicated findings it was the duty of the Commission to have done so. It is not within the province of counsel or a reviewing court.

It is not without significance that in other conspiracy cases, including three of them which have recently been before the Circuit Court of Appeals for the Seventh Circuit the Commission has made forthright findings of the conspiracy it charged in unmistakable terms.[11] The absence of

[11] *Cf. United States Maltsters Assn.* v. *Federal Trade Commission*, 152 F. (2d) 161 (C. C. A. 7th, 1945); *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. (2d) 478 (C. C. A. 7th, 1946); *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321 (C. C. A. 7th, 1944). And see Major J. below, R. 16778; 16814.

such a finding here, therefore, strongly suggests that it was no oversight but stems from a determination of the Commission that there was an absence of evidence to sustain it. In fact, where the Commission thought there was a basis in the evidence for a forthright finding of conspiracy or illegal concert of action on some other aspect of cement marketing, it did not neglect so to find. As already shown, it did so as to the ancient history on its original theory of the case, and elsewhere.[12] It did not, however, find anywhere the existence of conspiracy among these respondents during the period in question to use and maintain a multiple basing point system either through the Institute or otherwise, upon which its order is based.

On the contrary, and as the court below pointed out, there are important and significant omissions in the findings respecting the use of the pricing method, omissions which make clear the absence of the restraint which would be expected to accompany a conspiracy to use the method if such a conspiracy existed.[13]

Thus, there is no finding of an agreement express or implied as to the mills which are to be basing points; in fact the Commission expressly found that "The number and identity

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[12] The court below referred to extracts from 30 findings applicable to some or all respondents which were called to its attention by the Commission (R. 16784). These included findings of "understandings and agreements" (Fdgs. 6 (a), 7 (h), 12 (a), 17 (d); R. 15991-92, 16055, 16098); "Cooperation which amounted to Agreements" (Fdg. 8 (i), R. 16016); "Cooperation, Understandings and Agreements" (Fdg. 11 (b), R. 16046); "Collective Action" (Fdgs. 13 (a) and (e), 15 (j), R. 16060, 16061-62, 16081, 16082.

[13] R. 16785-86, 16797, 16799, 16800, 16801, 16804, 16806, 16807, 16809.

of base and non-base mills change from time to time. A base mill may, for reasons its management considers sufficient, become a non-base mill, and, similarly, a non-base mill may become a base mill" (Fdg. 7 (b), R. 15989).

There is no finding of an agreement express or implied at any time as to the price base at the base mills. Moreover, it is undisputed then that each mill is free to establish any price base it chooses, and the Commission affirmatively found that there has not even been any "systematic exchange * * * of basing-point prices or changes in such prices" (Fdg. 9 (e), R. 16028-29).

There is no finding of an agreement express or implied among the respondents to sell only at delivered prices, either under a multiple basing point method or any other method. Coupled with this there is no finding of an agreement not to sell f.o.b. mill. In fact, the findings ignore the evidence showing that there were many f.o.b. mill sales.[14] Under the findings then the only permissible inference is that any mill was free to sell either way, as it chose and, in fact, the record shows this to be the case.[15]

There is no finding of an agreement express or implied not to undersell the lowest prices in any market. In fact, there is a finding of "numerous" and "widespread" price concessions. (Fdg. 6 (c), R. 15987). The clear inference is that each company was free to make any price it chose in the market, and the record so shows.[16]

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[14] This is referred to in detail, below pp. 113-119.

[15] App. I, 170-76; App. II, 727-34, 944-47.

[16] App. I, 254-85.

The findings or the absence of findings on the important points noted, when coupled with the absence of any finding as to the existence of a conspiracy beginning in August, 1929, to use a multiple basing point system, make plain that there is the complete absence of any agreement or conspiracy which restricts the freedom of any respondent as to its prices or method of pricing, necessary to sustain the Commission's order.

There remains then in connection with this issue to consider the alternative arguments which were urged upon the court below and which are reasserted with minor variations here: (1) that the findings and proof as to the organization and activities of the Institute are sufficient to sustain the charge of conspiracy (Com. Br., pp. 64-65; also pp. 93-98. This is covered in Point II, C pp. 42 to 83 next following); or (2) that the findings and proof as to concurrent use of the pricing method were sufficient to establish the conspiracy charged; or that, in any event, the pricing method is illegal *per se* and no agreement as to its use is necessary to proscribe it (Com. Br., pp. 42-61. This is covered in Point II, D, E, and F, pp. 83 to 146 below); or (3) that the findings and proof as to miscellaneous marketing policies and acts were sufficient to sustain the charge of conspiracy (Com. Br., pp. 78-80, 94. This is covered in Point IV, pp. 138-216, below). There also remains discussion of the correctness of the decision below respecting the reliance of the Commission on incompetent evidence on several important points. (These rulings are covered in Point II, B, pp. 26 to 42 below and Point VI, pp. 234 to 244, below; see also pp. 173-180, below.)

B. In Substantial Respects and to an Unknown Extent the Findings are Based Upon Incompetent Evidence

1. The Findings as to the Activities of Trade Associations that Existed in this Industry Between 1902 and 1919 are Based on Incompetent Evidence.

The Commission introduced in evidence, over respondents objections,[1] excerpts from minutes and written records of activities prior to 1919 of the old Association of American Portland Cement Manufacturers (A. A. P. C. M.), the Association of Licensed Cement Manufacturers (A. L. C. M.); the Cement Manufacturers Protective Association (C. M. P. A.). and the Portland Cement Association (P. C. A.). Extensive reference is made to this evidence, and great reliance is placed on it, in the findings.[2]

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[1] Error is assigned respecting this evidence in respondents Statement of Points as follows:

For giving consideration or weight to it as support for any findings, Statement of Points, No. 9 (f), R. 16239.

For important failures to find in connection therewith, Statement of Points No. 15 (a)-(c), R. 16243-16246; No. 17 (l)-(n), R. 16248-16251; No. 24 (b) (c), R. 16265-16267, No. 25 (b) (c), R. 16269-16270, No. 27 (c) (d), R. 16272-16273, No. 30 (a)-(e), R. 16276-16277;

For receiving it in evidence, and failing to strike it or limit its application, Statement of Points Nos. 40 (d), 41 and 45, R. 16286, 16289; and see Transcript references in support of this assignment in App. B to Statement of Points, R. 16320.

[2] Fdg. 5, R. 15983: reference is made to the existence of the A. A. P. C. M. from 1902 to 1916 and to the change of its name to Portland Cement Association in 1916; to A. L. C. M. from 1907 to 1911; and to C. M. P. A. from 1916 to shortly before this Court's decision in which that association was a defendant.

Fdg. 6 (a), R. 15983-84: In this paragraph the statement is made that the records of "cooperative activity" beginning with the A. A. P. C. M. in 1902 "and continuing to the present time, show that the cement industry has evidenced a strong aversion to free competition and that its members have, by understandings and

The court below pointed out that the complaint charged a combination antedating the organization of the Institute in August, 1929; that the case was tried on the theory of a continuing conspiracy beginning some 25 or 30 years before the complaint was filed in 1937; that the findings themselves were drawn on that theory and that not until the Commission's brief was filed in the lower court did it take the position that the conspiracy originated in 1929 (R. 16776) and then held:

> "From what we have said it is perfectly plain that this background testimony was not used 'for the purpose of throwing light upon the subsequent offenses, acts, and practices charged,' but that it was used as a part of the foundation upon which the finding of combination was predicated." (R. 16776)

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agreements, developed and maintained substantial uniformity of action among themselves with respect to practically every marketing procedure which involves price or other competition."

Fdg. 7 (i), R. 15992-96: this is made up entirely of excerpts of A. A. P. C. M. minutes of meetings in 1904, 1905, 1906 and 1908 which it is argued shows a background of concerted action on prices out of which "the multiple basing-point delivered-price system evolved".

Fdg. 7 (j) R. 15996-97: this is part of the history of the A. L. C. M. from 1907 to its dissolution in 1911 designed, presumably, to support the same argument that is made in Par. 7 (i) above.

Fdg. 7 (k), R. 15997: this is an excerpt from minutes of an A. A. P. C. M. meeting in 1910 designed to show the extension of the alleged "system" to Michigan.

Fdg. 8 (b), R. 16006-07: this contains a reference to the freight rate books furnished by the C. M. P. A. until 1932.

Fdg. 8 (d), R. 16008-11: this contains excerpts from three letters relating to the C. M. P. A. freight rate books.

Fdg. 13 (c), R. 16060-61: this contains excerpts from reports relating to specific job contracts of A. A. P. C. M. in 1915 and of P. C. A. in 1919.

Fdg. 14 (b), (c), R. 16065-69: these contain excerpts from minutes of meetings and reports of A. A. P. C. M. in 1905, 1906, 1915 and of P. C. A. in 1919 relating to terms and conditions of sale.

This ancient evidence and the findings based thereon were properly held to be incompetent and Judge Major added:

> "We have no way of knowing, of course, the extent to which the incompetent testimony and findings entered into the ultimate finding, but it is evident that they played no small part." (R. 16784)

Obviously proof of activities between 1902 and 1919 is incompetent as proof of a conspiracy that is alleged to have begun in August, 1929.

The Commission, in its petition for writs of certiorari and in its brief before this Court, specifies this holding of the court below as an error to be urged (Brief, p. 29, error No. 5) but at no point in its brief is any argument presented in support of this error. We therefore assume that it has been abandoned.

The holding of the court below was manifestly correct.

Fdg. 15 (b), R. 16071-72: this contains excerpts from minutes of A. A. P. C. M. meetings in 1903, 1904, 1910 and 1911 relating to over-production of cement resulting in lower prices and to statistical activities of that association.

Fdg. 17 (b), R. 16090-91: this contains excerpts from reports of A. A. P. C. M. in 1915 and of P. C. A. in 1919 dealing with recommendations as to the definition of a dealer which it is argued shows concerted action on these subjects which "began many years ago."

Fdg. 20 (a), R. 16104-05: this contains reference to the standardization work of A. A. P. C. M. in 1904 and 1915 and of P. C. A. in 1919.

Fdg. 20 (c), R. 16106: this contains an excerpt from minutes of an unidentified association (it was A. A. P. C. M.) in 1904 which, it is argued, shows a direct connection between cement prices and standardization.

THIS OLD EVIDENCE IS INCOMPETENT AS SO-CALLED BACKGROUND.

1. A substantial number of the present corporate respondents against whom this evidence is offered were not even in existence during the years 1902-1919. Thus, 31 of them were not in existence prior to 1916 and 25 of them were not in existence during the life of C. M. P. A. (1916-1922).[3] What others did in years long since gone by is incompetent as proof of background to throw some light on what newcomers in the industry have done since August, 1929.

2. As to all of the present corporate respondents, there are wide gaps of time during which no proof was offered of any trade association or other cooperative activity by any corporate respondents.[4] Thus, the C. M. P. A. was dissolved in 1922 and there is a gap of 7 years between that time and August, 1929, when the Institute was organized. The last of the old A. A. P. C. M. evidence is in 1915 and there is a gap of 14 years between that date and August, 1929. The last of the old A. L. C. M. evidence is in 1911 and the gap here is 18 years!

In short this old evidence is worthless and incompetent as proof of anything in this proceeding.

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[3] Names and details as to the membership of this and other associations of earlier years will be found in App. III, 1779-95. The names and dates of organization of these respondent producers also appear at App. III, 1785-86.

[4] Apart from the P. C. A., the activities of which since January, 1919 are in no way challenged in this case.

IF THIS OLD EVIDENCE IS COMPETENT AS SO-CALLED BACKGROUND, IT IS A BACKGROUND OF LEGALITY.

All of this old evidence was resurrected from the old files of the Department of Justice. It was available for whatever use the Department saw fit to make of it in the first *Cement* case. In fact, much of it is in the record in that case[5] and all of it related to the subject matter and the issues of that case. None of it is newly discovered evidence. As Judge Major put it "* * * we know of no reason why it all could not have been used if deemed material" (R. 16775) and further:

> "* * * it ill behooves the Commission at this late date to infer that government counsel at that time was so incompetent as to fail either to offer or rely upon evidence material to its case. * * *" (R. 16775)

The decision of this Court in the first *Cement* case in 1925 stands as a final adjudication of this background evidence.[6] It is a background of legality.

The basic reasons that underlie *res judicata* and the estoppel of the judgment prevent the Commission from making any use of this old evidence. It should be stricken from the findings.

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[5] Com. Ex. 3196 showing the history and activities of A. L. C. M. and Com. Exs. 3188-3200 showing the history and activities of C. M. P. A. are all excerpts from the record in the *Cement* case as appears on the face of these exhibits. Transcript of Record, Supreme Court, October Term 1924, No. 551, *C. M. P. A.* v. *United States*.

[6] See our argument as to the first *Cement* case at pp. 150 to 157 below.

2. *The Findings as to the Activities of the Respondents in the Preparation, Amendment and Administration of the N. R. A. Code from 1933 to May 27, 1935 and in the Provisions of the Code Itself Are Based on Incompetent Evidence.*[1]

a. Use of N. R. A. Evidence in Findings.

The lower court stated that "The findings covering this period, like those referring to the background, are numerous and strongly relied upon by the Commission in support of its asserted finding of the combination charged" (R. 16777).

The Government in its brief, page 83, states that no finding even hints that the N. R. A. Code constituted or was any part of the combination and that findings relating to the N. R. A. Code merely trace the history of certain acts and practices of the respondents. The fact is, however, that counsel for the Commission in the brief before the lower court pointed to three of the findings based on N. R. A. evidence as findings of combination.[2] And the Government in its brief before this Court (pp. 57, 71) points to one of those same findings (Fdg. 7 (r), R. 16004) in the course of its argument as to the sufficiency of the findings.

The findings to which our argument is addressed are those based upon evidence of activities of the Institute and of any other respondents in the preparation and submission to the N. R. A. of proposals for a Code of Fair Competition,

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[1] Statement of points Nos. 9 (g), 41 and 45; R. 16239, 16286, 16289.

[2] Brief for Respondent Commission in the Circuit Court of Appeals, pp. 225-226, where Fdg. 7 (p), R. 16001, Fdg. 7 (r), R. 16004, and Fdg. 17 (d), R. 16093 are listed as findings of combination. See Major, R. 16784.

and of amendments thereto, for the industry and all evidence as to the terms of the Code itself and its amendments and as to activity in compliance with the provisions of the Code and its administration by the Code Authority. In short, our argument is addressed to evidence which falls squarely within the exemption provision of Section 5 of Title I of the National Industrial Recovery Act (48 Stat. 195, 198) and to findings based on such evidence.

The Institute was the trade association that applied to the President of the United States under Sec. 3(a) of the National Industrial Recovery Act (48 Stat. 195) of June 16, 1933 for the approval of a Code of Fair Competition for this industry. With the passage of this Act and during the summer and fall of 1933 membership in what had been for two years and more an inactive trade association jumped by 59 members so that it could qualify under Sec. 3(a) of the Act as "truly representative" of the industry. Throughout the summer and fall of 1933 the members of this industry, like the members of every other industry in the country, were busily engaged in the preparation and submission of proposals for their Code to the N. R. A. This period ended with the approval of the Cement Code by the President on November 27, 1933 and thereafter it was administered by the Code Authority set up under Article IV of the Code until May 27, 1935 when the whole N. R. A. structure was struck down by this Court in the *Schechter* decision.

At the outset it is significant that there is not a word in the proposed N. R. A. Code submitted by the Institute, as to basing points or the calculation of delivered prices with reference to basing points.

Findings based on N. R. A. evidence are as follows:

The findings state that the Institute controlled the Code Authority set up under the Code subject, in turn, to the N. R. A. (Par. 5, R. 15983)[3] that the Institute proposed a provision, which was never approved, that all cement should be sold f. o. b. point of delivery except that quotations to the federal government should be f. o. b. mill where land grant rates were involved (Fdg. 7 (p), R 16001-02) and the findings then recite provisions that appeared in the Code dealing with shipment of cement by transportation agencies that gave rebates (Fdg. 11 (g), R. 16054), diversions in transit (Fdg. 12 (b), R. 16056), a standard form of specific job contract (Fdg. 13 (f), R. 16062-63), terms and conditions of sale (Fdg. 14 (f), R. 16070-71), the provisions of Article XI as to direct sales and sales to dealers (Fdg. 17 (d), R. 16093-96) and the standardization provisions (Fdg. 20 (a), R. 16105). At one point the findings recite a provision that was drawn up but, as the Commission finds, was not even submitted to N. R. A. (Fdg. 10 (g), R. 16037-38).

At another point the findings set out what are called "certain occurrences" with respect to the N. R. A. Code to show "the determination of the respondents to maintain the multiple basing-point delivered-price system in the sale of cement and the degree of their resistance to selling f. o. b. mill" (Fdg. 7 (r), R. 16004-06).[4] There is set forth a telegram of May 8, 1934 from the Deputy Administrator of N. R. A. in charge of the Cement Code to the Chairman of

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[3] Statement of Points No. 15 (d) (e), R. 16246; App. III, 2118-22. See Article IV of the Code under which the Code Authority is elected by the Board of Trustees of the Institute and the representation of the industry on the Board of Trustees is also provided. Provision is made that the Code Authority shall at all times be "truly representative of the industry". See App. III, 2104-07.

[4] Statement of Points No. 17 (aa)-(cc), R. 16253-54.

the Code Authority reciting a request by the President of the United States to encourage manufacturers to submit f. o. b. mill prices and urging that the question be placed before the Code Authority and a report of its action be submitted within two weeks. There was nothing in the Code to authorize the Code Authority to take any action on this subject as the Code contained no limitation on the kind of prices that a member of the industry might quote and file with the Code Authority.[5] In deference to the high office of the President the Code Authority requested an audience with the President so that the facts might be put before him. There is no evidence that the requested audience was ever granted. This telegram produced a flurry of correspondence and consultation among members of the industry. There was also correspondence by industry members with Dr. Morgan, Chairman of the Tennessee Valley Authority.[6]

We submit that the Code Authority was well advised not to overstep the bounds of its powers under the Code. In fact if concerted action had been taken in response to this invitation, judging by the action here taken by the Commission, the members of this industry would surely have been confronted with a charge of conspiracy.

The findings also recite the provisions of Article VI of the Code granting to the Institute authority to formulate a plan or plans for the equitable allocation of available business among all members of the industry for submission to N. R. A. (Fdg. 15 (g) (h), R. 16076-78).[7] It is also found that "no plan or method was ever approved by N. R. A." (Fdg. 15 (g), R. 16077) and the further fact—ignored by the Commission—is that no plan or method

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[5] App. II, 646-649.

[6] App. II, 676-687.

[7] Statement of Points No. 25 (g), R. 16271.

was ever submitted to N. R. A. because none was ever approved by the industry or by any group in the industry. All of the evidence on this subject is digested in App. III, 2126-51 and it points to only one conclusion and that is, that even when the teeth of the Sherman Act were drawn by the operation of the N. R. A. the members of this industry were unable to agree on any such plan either for the industry as a whole or for parts of it.

On two points the findings point to activities that started under the Code but were carried on after May 27, 1935, the date of the *Schechter* decision.

The first is the finding that "for some seven months" (it was in fact, as the record shows, only a little over three months[8]) after the *Schechter* decision, the Institute "attempted to administer some of the provisions of the N. R. A. Code" through its Trade Practice Committee composed of the same individuals who had previously constituted the Code Authority (Fdg. 7 (q), R. 16003-04). This was a short lived effort to continue on an entirely voluntary basis the open price filing provisions of the Code. The evidence shows that the effort simply broke down in a short time. Without the compulsion of the N. R. A. Code the respondents would not carry on this activity on a voluntary basis.[9]

The second is found in Article VII of the Code.[10] Under this the Institute "shall promptly collect complete information" as to existing productive capacity in any area in

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[8] See App. II, 692-99, where the evidence as to the activities of the Trade Practice Committee is digested.

[9] App. II, 696-97.

[10] For the text of Art. VII and the evidence on this subject, see App. III, 2151-66.

which a new plant was projected or the productive capacity of an existing plant was to be increased or if a plant was to be moved. If the information so collected disclosed that the project would increase the problem of over-production or over-capacity in the area, the Institute might petition the President of the United States to prohibit the contemplated action. The finding then recites an expression by the Board of Trustees of the Institute (in a resolution directing the Code Authority to handle problems arising under Article VII) that there should not be any increase in productive capacity in any area (Fdg. 16 (b), R. 16082).

The findings then recite action by the Board of Trustees on May 10, 1934 on a matter that had been referred to the Board by the Code Authority on March 13, 1934. It was found that the proposed removal of 50% of Southwestern's Victorville plant to a new location would not increase the productive capacity in the District, leave to relocate the plant was granted and that was the end of the matter. (Fdg. 16 (b) *supra.*)[11]

In subparagraphs (c) and (d) of Fdg. 16, R. 16083-87,[12] there are extensive quotations of evidence relating to the financing by the Reconstruction Finance Corporation of a partly built plant at Foreman, Arkansas. This evidence starts in January, 1934 and continues with sporadic correspondence as late as November, 1936.[13] The matter first came to the attention of the Code Authority in January, 1934 in a letter from a member of the industry with a plant in Arkansas and a few months later in a request for information from the R. F. C. Information was collected and

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[11] App. III, 2156.

[12] Statement of Points No. 26 (b) (d), R. 16271-72.

[13] See App. III, 2154-56; 2157-63.

supplied to the R. F. C. showing that in 1933 the 22 plants that then supplied the potential market of the proposed Foreman plant had operated at an average of 27.6% of capacity.[14] Up to this point all that was done was done in strict conformity with the provisions of Article VII of the Code.

The problem persisted, but what happened? The record shows that in September, 1935 there was a rumor that the R. F. C. was going to make a loan of $300,000. The President of the Institute at once wired a protest to Jesse Jones of R. F. C. and urged members of the Institute to do likewise. Many did. In January, 1936 the R. F. C. sought more information from the Portland Cement Association office in Washington, D. C. and the Institute turned over to the P. C. A. the data it had collected. In November, 1936 there was word that some loan had been made but the plant never operated.[15]

The findings distort the evidence as to this effort of the Institute after the *Schechter* decision. The full story revealed by this evidence is meaningless in relation to the conspiracy charged in this proceeding. Does the Commission contend that a trade association may not supply information to its government upon request and may not protest vigorously against the waste of taxpayers' money in building a new plant in an industry, the capacity of which in those depression years already far exceeded demand? Why was this evidence introduced? It is not probative of any possible violation of the statutes under which this proceeding was brought.

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[14] App. III, 2156.

[15] *Id.*, 2157-2163.

The lower court, after referring to a few of the findings mentioned above, said:

> "Numerous other findings incorporate correspondence between the Institute and the Code authorities, correspondence between members of the industry relative to Code provisions and those proposed, as well as other statements made by representatives of some of the respondents relative to the same subject matter. We have read all this evidence as it appears in respondents' appendix[16] and if it reveals anything it is the great divergence of opinion which existed between members of this industry. It was with difficulty that many of them were persuaded to agree to what was proposed and done in connection with the Code. In fact, some never did agree. *They were a queer lot of conspirators*" (R. 16777, Italics ours).

b. The Law.

Section 5 of Title I of the National Industrial Recovery Act (48 Stat. 195, 198) provided:

> "While this title is in effect * * * and for sixty days thereafter, any code, agreement or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States."

The Commission makes a mockery and a fraud of this exemption from prosecution when it seeks to use evidence of "action complying with the provisions" of N. I. R. A. as

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[16] See App. III, 2099-2166; App. II, 617-699; App. IV, 2298-2307.

evidence of the nationwide conspiracy charged against these respondents and when it seeks to find here substantial evidence with which to support its findings. If the Commission may do this, then N. R. A. was nothing but a trap for all American industry.

The holding of the lower court as to the use of this N. R. A. evidence as proof of conspiracy is couched in the strong words that this action of the Commission deserves, as follows:

> "Assuming this evidence might be proper for the purpose of 'illumination' on the same theory that the Commission seeks to justify the admission of background testimony, it certainly is not admissible for the purpose of showing a conspiracy prior or subsequent to the N. I. R. A. period or a continuity of such conspiracy during such period. To hold that members of an industry can be invited and perhaps required by the government to participate in a program for the general welfare under a promise of immunity and that evidence of their doings and activities in connection therewith can be used to hold them for conspiracy would constitute a fraud, or perhaps confidence game would be a more appropriate designation" (R. 16779).

Standard Oil Co. v. *United States*, 221 U. S. 1, is cited in the Government brief, page 84, as controlling authority as to the admissibility of this evidence.

The acts as to which evidence was received in that case were acts done by the defendants before the passage of the Sherman Act but they were not acts which would not have been done were it not for the assurance of an Act of Congress that what was done would not be used against them

in proceedings under the antitrust laws. And they were not acts done subject to the approval and under the supervision of an agency of the government. The rule in the *Standard Oil* case can be applied here only if the assurance of the Congress in the exemption section of the N. I. R. A. is to be set at naught. That, in the words of Judge Major in the court below, would be a "confidence game"—unworthy of our government.

If this evidence is to be received to throw light on what was done before or after N. R. A., then the only light it throws is that during N. R. A. the members of this industry responded to the efforts of the President and the Congress to bring order and recovery, in the manner decreed and under its terms, to the prostrated economy of 1932 and 1933.

The Commission argues in its brief page 85 that *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2d) 321, C. C. A. 7th (1944), impliedly approved the admission and consideration of evidence relating to an NRA Code. There is no such holding, implied or otherwise, in that decision. On the contrary, the price-fixing combination charged in that case was based upon what happened after the invalidation of the N. I. R. A. and on one incident that occurred before the passage of the N. I. R. A. No issue was raised as to evidence received as to the N. R. A. Code.

United States v. *Socony Vacuum Oil Co.,* 310 U. S. 150 (1940), as the lower court held (R. 16778-79), lends no support to the Commission's position. The indictment under the Sherman Act in that case charged the defendants with having engaged in two concerted buying programs from February, 1935 to December, 1936 (310 U. S. at p. 167). These buying programs had nothing to do with the provisions of the Code for the petroleum industry. The

defense interposed in that case was not that the buying programs gained immunity from prosecution under the Sherman Act through approval in a Code but rather that the programs were undertaken and carried out with the knowledge and acquiescence of officers of the government charged with responsibility in the administration of the Code, and that proof of those facts should "be taken into consideration in order to judge the purpose, effect and reasonableness of their activities in connection with the buying program" (310 U. S. at pp. 201). That defense was rejected (310 U. S. at pp. 225-228). In short, since the buying programs were admittedly not authorized under the Code (310 U. S. at p. 201) proof of knowledge and acquiescence by the government gave no immunity under the National Industrial Recovery Act and in addition it had no relevance to the issue of price fixing (310 U. S. at pp. 225-228). We make no such defense here.

The lower court correctly applied that decision in holding that if the defendants in that case, through the exclusion of their offers of proof, were unable to rely upon evidence of their activities during the Code period in explanation of their subsequent acts the Commission in the present case may not rely upon activities during the Code period (strictly limited to activities of respondents in the preparation, amendment and administration of the NRA Code from 1933 to May 27, 1935 and in the provisions of the Code itself) to show a conspiracy during that period or at any other time (R. 16778-16779).

The NRA evidence to which our contention is addressed is incompetent as proof of conspiracy at any time. If it may be used as background, it is a background of legality.

3. *Other Incompetent Evidence.*

In the court below we challenged other evidence relied upon by the Commission in important respects in its findings. Our argument as to this is at pages 173 to 180 and 234 to 244 below. The court below did not find it necessary to consider more than one item—the Treanor letter—and, as Judge Major put it, "We only mention this for the reason that the Commission has, in our judgment, exaggerated its importance beyond all reason" (R. 16779).

C. Nationwide Conspiracy as Charged Is Not Shown in the Findings and Proof as to the Organization and Activities of the Institute.[1]

The Commission contended in the Court of Appeals that the Institute was "the chief common bond which united them, the common purpose which is the core of every conspiracy" (Major, J., at R. 16767). Its position here is slightly altered in keeping with the attempt to use all the findings, including those based on the pre-August 1929 evidence and avoid any commitment as to the date when the supposed conspiracy began. Nevertheless, it is contended that "The Commission's findings that a purpose of the Institute was to maintain the multiple basing-point delivered price system, is a finding that there was combination and agreement by and between the Institute and its members and officers to maintain this system" (Com. Brief, p. 65). It is further contended that membership in the Institute "coupled with subsequent adherence to the pricing system, is tanta-

[1] Statement of Points, Nos. 11 (R. 16240), 14 (e) (R. 16242), 15 (d)-(f) (R. 16246), 17 (r)-(s), (y), (z) (R. 16252-53), 18 (R. 16254-58), 22 (R. 16262-64), 23 (R. 16264-65), and 24 (a), (d) (R. 16265-67).

mount to explicit agreement to maintain the system" (id., p. 96) and sufficient to connect all members with the combination (id., pp. 97-98).

Judge Major answered this argument succinctly in the Court of Appeals saying:

> "If the Commission thought that membership in the Institute standing alone, in connection with the use of the basing point system, was sufficient upon which a finding of combination could be predicated, the question naturally arises as to why such a finding was not made. We doubt if such a finding could be sustained, but whether so or not is now immaterial." (R. 16784)

We shall consider the sufficiency of the evidence on this point presently (p. 42-83 below). Certainly here we might add that it is not the province of Commission counsel or of a reviewing court to supply missing findings or inferences.

The Commission's brief overstates the findings as to the Institute and understandably exaggerates its importance. Thus, the Commission did not find in paragraph 4(c) (R. 15982), as suggested on pages 93 and 94 of the brief that the Institute's "members included practically all domestic producers of cement, and that it *was* an effective vehicle for the formulation and execution of the collective plans and purposes of the members" etc. (Italics ours). The finding was that "*At the time this proceeding was commenced,*" [i.e., July 1937] "practically all producers of cement were members of the Institute and the industry *thus had* an effective vehicle" etc. This finding is meaningless in terms of a conspiracy prior to July 1937. Moreover, *having* a vehicle for conspiracy, and *using* it for that purpose are quite dif-

ferent things. Counsel has deftly read something into this finding which plainly is not there.

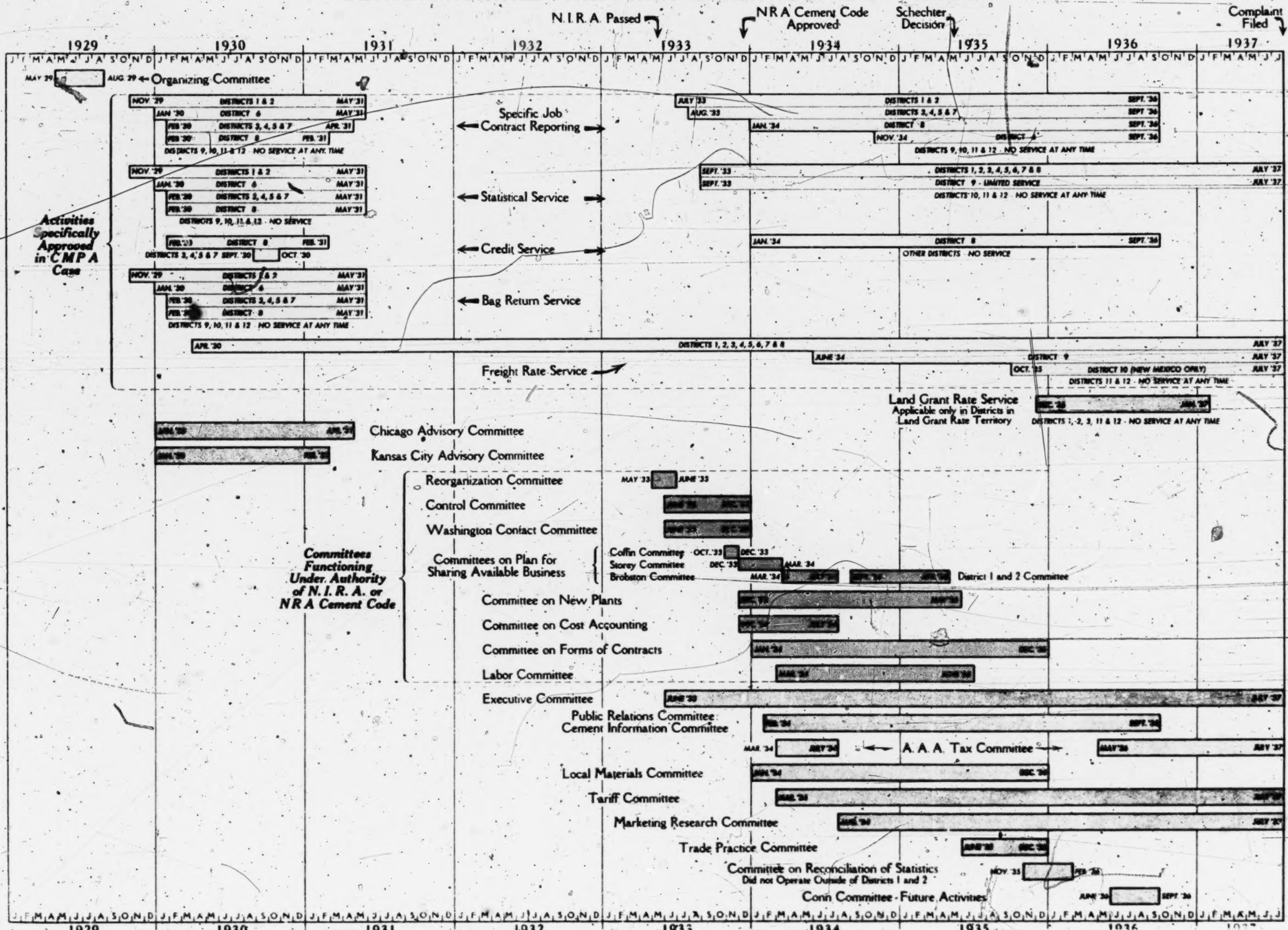
It seems appropriate to explain briefly at this point, therefore, just what are the findings as to the Institute and to show from the record, what the Institute was and what it did from the time of its organization in August 1929 to the time the complaint was filed in July of 1937. The accompanying chart shows its activities during that period.

A faithful summary of the Commission's findings respecting the Institute's connection with the use of delivered prices or of a "multiple basing point system" of marketing, stripped of skillful innuendo, amounts to the following:

In 1929, when the Institute was organized, it was the "custom and usage" of the cement trade to sell cement under a "multiple basing point delivered-price system" (Fdg. 7 (o) R. 16000-16001) except in Western Washington where this "system" did not come into use until 1931 (Fdg. 7 (n) R. 16000). The Institute took action which was consistent with delivered price selling: thus, the Code of Ethics contained a provision declaring it to be discriminatory between purchasers, and therefore an unfair trade practice, for a manufacturer to divert or to permit a purchaser to divert in transit cement shipped to one destination, to another destination where the result enables the purchaser to obtain the cement at less than the manufacturer's prices at the point of final delivery (Fdg. 7 (o) R. 16000-16001); the Code of Ethics also declared that a standard form of sales contract be drafted and adopted, and subsequently the Institute reported to the members recommended provisions for such a contract, including a recommendation that the contract should contain a definite agreement to sell and buy a

INSTITUTE ACTIVITIES -- FROM ORGANIZATION TO DATE OF COMPLAINT

Chart XI - A



specific quantity at a definite price f.o.b. destination (Fdg. 7 (o) R. 16000-16001); and the freight rate books (plus dissemination of land grant freight rates for a year) were an aid in selling at delivered prices on a basing point system (Fdg. 8 R. 16006-16022). The foregoing is then capped with the assertion that the multiple "basing point system" was "in effect" in most places in 1933 when N. I. R. A. was enacted, from which the Commission infers that thus the Institute had "effectively supported and maintained" this "system" (Fdg. 7 (p) R. 16001).

The findings then turn to the NRA Code. These findings in summary are: proposals by the Institute respecting the NRA Code for the Cement Industry included a requirement for delivered price selling and when objections were raised the Institute defended delivered prices (Fdg. 7 (p) R. 16001-16003). The NRA Code as finally approved did not contain any provision requiring the use of delivered prices, but did contain provisions which recognized and were consistent with delivered price selling (a standard sales contract, a provision similar to that noted above respecting diversions in transit and a provision against use of transportation agencies which give rebates). This recital is concluded with the assertion that "the multiple basing-point delivered-price system was continued in full operation during the NRA Code Period" (Fdg. 7 (p) R. 16003).

As to action after NRA, the Commission points to a Compendium issued by the Institute which contained recommendations similar to the provisions in the NRA code referred to above, but without enforcement provisions (Fdg. 7 (q) R. 16003).

No provision to condemn what are referred to in the findings as "involuntary or punitive bases" appeared in the NRA Code although one was proposed, and no such recommendation appeared in the Compendium. This, the Commission finds, shows recognition and acceptance of the "necessity for retaining the compelling force" of "punitive bases in restoring and maintaining uniform prices determined according to the multiple basing-point delivered-price formula" (Fdg. 10 (g) (h) R. 16037-40).

Notwithstanding all of the foregoing recitations and assertions in the findings, there is no finding that the respondents or any of them, through the Institute or otherwise, ever agreed to use delivered prices or a "multiple basing point system of pricing". There is abundant evidence that a number of respondents had anti-diversion policies long prior to the organization of the Institute,[2] but there is no finding that any respondent adopted any such policy after the organization of the Institute or through the influence of the Code of Ethics or the Compendium. There is abundant evidence that cement sales contracts were phrased in terms of f.o.b. destination prices many years prior to the Institute's Code of Ethics,[3] but there is no finding that any respondent adopted that type of contract after the organization of the Institute, or as a result of the recommendation referred to in the findings, or as a result of the form of contract set out in the Compendium. In short, there is no finding that there was any agreement among the respondents, or any of them, to use or adhere to any of the policies or recommendations referred to above. There is no finding that the Institute ever took any action to enforce or attempt

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[2] *Infra*, p. 57, and App. III, 1741-42.

[3] See App. I, 97-166.

to enforce use of the policies or recommendations referred to, or that any compulsion existed. And the Commission could not point to adoption by any respondent of any of the policies or recommendations referred to. In fact, the only finding related to use or adoption of any practices is the following meaningless classic:

> "... Some of the current practices of the industry, designated by respondents as 'customs of the trade', originated in agreements entered into as long as 20 to 30 years ago [none were found by the Supreme Court in the first *Cement* case in 1925] and have persisted, with the support of collective action, in substantially their original form. Other practices having similar origin have been modified or extended by collective action, as circumstances required, into their current form. Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a few respondents have from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action." (Fdg. 6 (a) R. 15984).

How can *any* respondent meet that finding!

The Commission does not find or contend that the Institute ever was a vehicle for exchange of price information (except during NRA and a brief period of voluntary open price filing thereafter). As to this, Fdg. 9 (e) is as follows:

> "Except to the extent that the dissemination of delivered prices during the NRA Code period and

some seven months[4] thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices. No such exchange is needed in the successful operation of the multiple basing-point delivered-price system. When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately. Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made." (R. 16028-16029).

Here is an admission that there was no conspiracy as to price information. We agree. There was none.

On the question of showing the alleged combination to maintain the "multiple basing point system" through the Institute, therefore, we have the bare fact that a trade association, otherwise lawful, may at worst, be said to have conducted its affairs in the setting of the customs that existed in the trade and to have taken no affirmative action to change any of those customs. It is not claimed or found that any trade practices were *changed* by or through the influence of the Institute.

The thesis of the Commission, in its argument as to the Institute, is that proof and a finding of the conspiracy

[4] It was in fact, as the record shows, only three months. See argument above, p. 35.

charged are found in the Institute's statement of purposes (Com. Br., pp. 64-65); and that it took action which could have implemented the conspiracy charged, hence the Court should infer that the conspiracy existed and was found by the Commission (Com. Br., pp. 63, 93-94). The principal subjects of this argument are the Institute's Articles of Association, certain provisions of the Code of Ethics and the freight rate books. We consider the findings and the facts as disclosed by the evidence relating to these subjects in what follows.

1. The Organization and Purposes of the Institute in 1929 and Its Revival in June 1933.

The evidence respecting the organization of the Institute is not disputed but much of it has been ignored in the findings of the Commission.[1]

As already noted the Commission found that the Institute's Articles of Association, adopted in 1929, included the following purposes.[2]

> "To adopt and promulgate a Code of Ethics for the government of the members.
> To establish and maintain all such *lawful trade customs and usages* for the protection of the members as the Institute may deem advisable." (Fdg. 7 (o), R. 16000). (Italics ours.)

There were many such lawful trade customs. The Commission then argues in its findings that "The multiple basing point delivered price system was one of the customs and usages to be maintained" (Fdg. 7 (o), R. 16000). In other words the Commission in effect finds that

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[1] All the material evidence on this subject is digested in App. III, 1797-1824.

[2] Material parts of the text of the Articles of Association will be found in App. III, 1825-1831.

the "multiple basing point system" was a "lawful custom and usage" in the cement industry in August, 1929.

From this point the argument jumps to the desired conclusion that therefore the Institute was organized for the purpose of maintaining it and that this was a part of the Institute's program.[3] This argument is based on assumptions, not facts and the lower court characterized this reasoning as "palpably untenable" (R. 16771). The fact is that there is not a line in any evidence of the original meetings of the Institute, in the Articles of Association, in writings of the respondents, or in any other place suggesting or indicating that a "multiple basing point system" or delivered prices or any method of pricing or anything pertaining to price maintenance was discussed or considered at any time in connection with the organization of the Institute. In fact, all the evidence is to the contrary.

The evidence is that the Institute was born as a result of an address by Federal Trade Commissioner W. E. Humphrey who, at a gathering of Portland cement manufacturers in May of 1929, encouraged them to form a trade association, draft a set of trade practice rules and seek a trade practice conference with the Federal Trade Commission;[4] that the original Institute so organized was organized under advice of counsel and consisted of 14 eastern cement

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[3] The Commission's brief carries this argument even further merely by repetition. Thus Finding 7 (o) (R. 16000) grows from a finding "that a purpose of the Institute was to maintain the multiple basing-point delivered-price system" (Com. Br., pp. 20, 65) to a finding that the Institute "had as *a primary goal*, maintenance of the multiple basing-point delivered-price system" (id., p. 96) and finally to a reference to "the Institute-sponsored multiple basing-point pricing scheme" (id., p. 98).

[4] App. III, 1798-1801.

manufacturers;[5] that the specific purpose of the Institute as expressed in its Articles of Association, not referred to and ignored by the Commission, was to resume statistical work such as had formerly been approved by this Court in the first *Cement* case.[6] The facts are moreover that when the Institute became sufficiently representative to justify submission of a Code of Ethics to the Federal Trade Commission, meetings were held with representatives of the Commission for the purpose of negotiating a trade practice conference as planned. This conference was postponed from time to time and did not take place finally because a difference of opinion as to policy developed between the Commission and the Department of Justice and Institute counsel advised that further action be deferred indefinitely.[7] When several of the original members of the Institute discovered that the trade practice conference would not be forthcoming, they resigned from the Institute and within a short time thereafter the Institute virtually collapsed.[8] The high point of membership during this early period was in 1930 when membership represented 54% of the total industry capacity. This had dropped to 21% by June of 1931 and it remained at that figure during a dormant period of two years.[9]

We submit that this state of affairs is hardly consistent with a dominating purpose to maintain a pricing system. The Commission's speculation in its findings and brief

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[5] App. III, 1802-03; and see Chart X-B, p. 1800.

[6] *Id.*, pp. 1801, 1825.

[7] *Id.*, 1809.

[8] The evidence showing this is undisputed and is collected in App. III, 1810-1812; see Chart XI-A, p. 1876 and Chart X-B, p. 1800.

[9] See Chart X-A, App. III, 1799.

respecting a purpose to maintain a "multiple basing point system," is therefore not only not supported by any evidence but directly contrary to the only evidence on the point.

In its finding as to the purpose of the Institute the Commission has also neglected to mention that the great majority of respondents—59 of them,—joined the Institute in 1933 in order to participate in the Code of Fair Competition under the N. I. R. A.[10] It is fantastic to hold that the participation of respondents in the revived Institute beginning in June 1933, was evidence of a common purpose to maintain a "multiple basing point system" in the face of the purposes of the N. I. R. A. to which they, along with the great majority of the American people, were subscribing.[11]

2. *The Institute Code of Ethics: 1929-1933.*

a. The Purpose of the Code of Ethics.

The evidence is that the Code of Ethics was prepared under advice of counsel for the purpose and with the expectation of its submission to the Federal Trade Commission as the basis for a trade practice conference in conformity with the suggestion of Federal Trade Commissioner

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[10] See Chart X-B, p. 1800; also pp. 1812-1818.

[11] The purposes of this legislation were stated in the Act itself, *inter alia*, "to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, * * * to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required) * * * and otherwise to rehabilitate industry and to conserve natural resources". See National Industrial Recovery Act, Sec. 1 (48 Stat. 195).

Humphrey noted above.[1] The Commission has made no finding based upon this undisputed, and under the circumstances extremely important, evidence.

The Code of Ethics was signed by representatives of twelve of the fourteen companies that were the original organizers of the Institute.[2] It contained no provisions for enforcement. It contained no machinery for checking upon violations or policing.[3] In short, under advice of counsel it was designed to comply fully and in every known way with the law. Article VII, entitled "Violations of This Code of Ethics" stated merely:

> "The violation of any of the above rules or declarations or any of the provisions of this Code of Ethics shall be deemed to be an unfair method of competition."[4]

This was consistent with the anticipated purpose of a trade practice conference with the Federal Trade Commission and is characteristic of Federal Trade Commission Trade Practice Rules.[5] The Commission has made no finding based upon this important and undisputed evidence.

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[1] The reason for the Code of Ethics, the text thereof, its short life and all evidence respecting the conduct of the respondents in connection therewith is set forth in App. III, 1835-1850.

[2] App. III, 1803.

[3] See text, *id.* pp. 1835-1843.

[4] App. III, 1843.

[5] Such rules customarily "condemn" or "approve" certain practices (CCH 8th Ed. Pars. 12,544, 12,588). As to the principal provisions criticized by the Commission see: standard sales contract (e.g., Cotton Seed Oil Mills Industry, Rule 6, approved Oct. 8, 1928, CCH 8th Ed. Par. 12,533, Mill Work Industry, Rule F. Par. 12,532); declaration against discriminatory diversions (e.g. Gypsum Industry, Rules 12 and 13, June 10, 1929, CCH 8th Ed. Par. 12,544, Face Brick Industry, Aug. 17, 1931, *id.*, Par. 12,558, Warm Air

The Code of Ethics was formally cancelled in June, 1933.[6] The Commission parenthetically so finds (Fdg. 7 (o) R. 16000). It was never, therefore, "agreed to" by the members of the Institute as stated by Commission counsel (Com. Br., p. 45), since as we have already shown the larger number of members joined for the first time under NRA when the Code of Ethics had been abolished. Moreover, during the existence of the Code of Ethics, Institute membership, as we have heretofore pointed out, fell to 20 companies and except for the freight rate service, the Institute was a dead organization.[7] But the Commission makes no finding based on this important evidence.

Reference to the foregoing uncontradicted facts sweeps away all basis for the Commission's innuendo of illegal common purpose and conspiracy among the respondents because there existed a Code of Ethics. The repeated speculation by the Commission in this regard, in this connection and elsewhere in the findings and argument, while ignoring uncontradicted facts and circumstances in order to bolster such unwarranted speculation is legally improper, and

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Furnace Industry (Nov. 18, 1932) Par. 12,570, Electrical Industry, Flexible & Heater Cord Group, March 10, 1930 (Par. 12,583), and see Marketing Rules and Regulations issued by the Bituminous Coal Commission under the authority of the Bituminous Coal Act of 1937 (50 Stat. 72, 15 U. S. C. A. §828). Sec. VI, Rule 8; 30 C. F. R. §318.

As to other provisions see the following: giving of premiums (Gypsum Industry, Rule 15, C. C. H. Trade Regulation Service, 8th Ed. Par. 12,544); sale of other products in combination with cement, etc. (*Id.*); (furnishing articles or facilities, etc. (*Id.*)); prepayment of transportation charges (Butter, Eggs, Cheese and Poultry Industries, *Id.* Par. 12,522; Electrical Industry, *Id.* 12,583), allowance of freight charges in excess of actual freight, etc. (Plywood Industry, *Id.* Par. 12,563).

[6] App. III, 1850.

[7] App. III, 1810-1812. And see Chart XI-A, p. 1876 and Chart X-B, p. 1800.

cannot be used in the place of substantial evidence to support findings: *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (1941); *Tesch* v. *Industrial Commission, et al.*, 200 Wisc. 616, 229 N. W. 194 (1930).

b. The Diversion Paragraph in the Code of Ethics.

The Commission in its findings and argument makes much of the provision in the Code of Ethics respecting diversion of cement in transit.[1] The provision, quoted in the findings, was:

> "For manufacturers to divert, or permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturer's market price at the point of final delivery, is discriminatory as between purchasers or users, and is therefore an unfair trade practice (Com. Ex. 138-S)" (Fdg. 7 (o), R. 16000).

In its complaint the Commission conceded that such a diversion amounts to a rebate to the diverter. Stated precisely the Complaint alleges that a diversion: "amounts to a concession in delivered price in favor of the transferee", i.e. the diverter (R. 128). As to this the Commission argues in the findings:

> "The diversions thus prohibited would not have been inconsistent with f.o.b. mill selling, but would tend

[1] Fdgs. 7 (o), R. 16000, 12 (b), R. 16056; Com. Br., pp. 76-78, 94, fn. 57. The Code of Ethics in its entirety is set out in App. III, 1835-1843.

to break down a multiple basing-point delivered-price system'"[2] (Fdg. 7 (o), R. 16001).

Examples of diversion are given in Appendix A, Vol. III, pages 1739-41. It must be remembered that cement dealers are respondents' most important customers[3] and it is undisputed in the evidence that protection of the dealer in his local market is necessarily one of the cardinal principles of any successful cement distribution policy.[4] The

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[2] Contrast this provision and finding with the matters found unlawful in *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553 at p. 591:

"Questions are presented with respect to miscellaneous 'transportation activities.' They relate to defendants' agreement to prevent transiting and diversion by customers when these would defeat freight applications; to concerted action in obtaining an agreement from transportation companies operating on the New York State Barge Canal that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate without open announcement; to recommendations of the Institute, concertedly observed, that none of the members should ship sugar on his own account by private charter except when the charter was arranged directly between refiner and carrier and refiner was satisfied that no broker, buyer or warehouseman was participating in the rate, and that the terms of every such private charter should be submitted to the scrutiny of the executive secretary of the Institute; to defendants' concerted refusal to participate in pool shipments, with sugar shipped on their own account, in order to aid customers in making up the required minima for cargo or carload rates; and to defendants' agreement 'to use only trucking concerns not affiliated with any buyer, broker, or warehouse and then only under non-rebating contracts.' The court found that defendants' action went further than was necessary to prevent secret rebating and amounted to unreasonable restraints. We see no reason for disturbing the findings on these subjects."

[3] App. I, 35-37; Fdg. 3 (c), R. 15981.

[4] The evidence showing this is digested in App. IV, 2499-2515. See also App. III, 1762-66 for evidence as to strenuous objections of dealers to diversion.

Commission has made no mention of this controlling fact in its findings. The effect of a diversion is to give the dealer who diverts a price advantage over his local competitor, and an opportunity to invade his market. The Institute Manager testified that this was the evil at which the anti-diversion provision in the N. R. A. Codes were aimed.[5] The evidence is that many cement manufacturers had policies against diversion in transit for many years before there was any Cement Institute,[6] although the evidence is wholly silent as to whether or not forty-three of the respondents have ever had any policy respecting diversion in transit before or after the Institute was organized.[7] There is no evidence that any respondent adopted an anti-diversion policy as a result of the formulation of the Institute. There are no findings as to these important and uncontradicted facts.

Now what of the Commission's argument that "diversions thus prohibited would tend to break down a multiple basing-point delivered-price system"? All that this argument amounts to is that if customers were permitted to commit a fraud[8] on the manufacturers by asking for delivery at one point and diverting the shipment to another

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[5] App. III, 1758-59.

[6] *Id.* pp. 1741-43.

[7] *Id.*, pp. 1741-43.

[8] The fraud here is of the same character as that which exists in the case of duplicating or padding specific job contracts. See pp. 69 to 71, below, and *Cement Manufacturers Protective Assn.* v. *United States*, 268 U. S. 588, 594-597, 603-604. In one case the buyer diverts from the represented destination to another; in the other case, he diverts from the represented use to another. The C. M. P. A. case held that active dissemination of data to assist producers in preventing such a fraud was lawful (p. 604). In the present case we have something far less.

point, this would "tend to break down a multiple basing-point delivered-price system".

The findings also refer in this connection to a recommendation by the Institute that no freight allowances be shown on invoices, and that receipted freight bills be accepted as part payment of invoices (Fdg. 12 (c), R. 16057). The customer's desire to divert under this circumstance would of course be defeated. But the Finding itself is that this recommendation was *not* adopted by respondents (Fdg. 12 (c), R. 16057).

c. Recommendations as to Sales Contract Provisions.

The Code of Ethics also declared that a standard form of sales contract be drafted and adopted, and subsequently the Institute reported to the members recommended provisions for such a contract, including a recommendation that the contract should contain a definite agreement to sell and buy a specific quantity at a definite price f.o.b. destination (Fdg. 7 (o), R. 16000-01).[9]

There is abundant evidence that cement sales contracts were phrased in terms of f.o.b. destination prices many years prior to the Institute's Code of Ethics,[10] and there is no finding that any respondent adopted that type of contract after the organization of the Institute, or as a result of the recommendation referred to in the findings.

The simple fact as to the provisions of the Code of Ethics is that a Federal Trade Commissioner suggested the formation of an association, the drafting of some trade practice rules and a trade practice conference. When these did not materialize the Institute and its Code of Ethics fell apart.

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[9] This is referred to in the Com. Br., p. 94, fn. 57.

[10] See App. I, 97-166.

Where in all this can there be any justifiable basis for the Commission's speculation, founded on no evidence, that these provisions of the Code of Ethics shows an illegal common purpose and conspiracy to maintain a multiple basing point system?

3. *The Freight Rate Books.*

The Institute undertook the publication of freight rate books in reliance upon the decision of this Court in the first *Cement* case that the publication of such books in this industry was a lawful trade association activity. As shown by the evidence, the inauguration of this rate service and its entire operation were governed by the decision in that case.[1] The Commission is seeking to retry and overrule that case.

In several important respects the Institute's rate service differed from the service approved in the first *Cement* case:

1. The Institute's rate books were made available to non-members of the Institute and the Commission so found (Fdg. 8 (g), R. 16013) and also to any member of the public who cared to purchase them as the lower court noted from undisputed evidence ignored by the Commission.[2] In the first *Cement* case the rate books were distributed only to members of the Association, 268 U. S. 588, at 597.

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[1] App. II, 1011. The evidence on this subject is digested in App. II, 997-1154. For the findings on this subject see Par. 8, R. 16006-22.

[2] R. 16809; see App. II, 1061-63. At first a fee was charged to federal and state officials but this was later abolished and books were supplied without charge.

2. The Institute's rate books were not limited to rates from basing points and the Commission so found (Fdg. 8(f), R. 16012). The rate books before this Court in the first *Cement* case were limited to rates from "established basing points," 268 U. S. 588, at 597.

3. In the first *Cement* case all members of the Association subscribed for and used the rate books. Here all did not. App. II, 1063-67.

In other respects the Institute's rate books were identical with those that were before this Court in the earlier case. In fact, the Commission found that the rate service in the first *Cement* case was in "much the same form as the rate information subsequently supplied by the Institute" (Fdg. 8 (b), R. 16007). In no respect did they go beyond what was approved by this Court.

The Commission's finding in this case is that:

> "The rate books published by the Institute were intended, as were those previously secured from other sources, to provide common freight rate factors for pricing purposes, avoid differences in delivered price quotations resulting from errors in rate calculations or failure to keep abreast of rate changes, and thus enable the corporate respondents to quote identical delivered prices for cement at all destinations; and they were in fact used for that purpose" (Fdg. 8 (d), R. 16008).

This is indeed a sinister sounding sentence. The key to the sinister implication, however, is in the phrase "to provide common freight rate factors". The Commission should have said here, as it does in the preceding paragraph: "These rate books show the railroad freight rates

on cement" (Fdg. 8 (c), R. 16008). If we re-read the above finding with this undisputed fact in mind it becomes clear that the freight factors "are common" because they are accurate existing official freight rates on cement; and it becomes clear that "differences in delivered price quotations" are "avoided" because, in so far as the freight rate factor is concerned, railroad tariffs accurately reflected in delivered prices could not result otherwise. The Commission would be better advised to order the abolition of published railroad tariffs.

It is significant, too, that the Commission has nowhere found as it charged in its complaint (R. 93) that respondents have any agreement or understanding that they will use the freight rate books.

The only finding as to use of the books is in the finding quoted above that "they were in fact used" by the corporate respondents and this is misleading because many respondents did not receive or use the books as the lower court noted from undisputed evidence ignored by the Commission.[3] Here is a splendid example of what Congress had in mind when it provided in the new Administrative Procedure Act that a reviewing court shall set aside a finding "unsupported by substantial evidence" and that "in making the foregoing determinations the court shall review the whole record."[4] The finding suggests that all of these 76 respondents used the rate books published by the Institute whereas the record shows that rate books were not even

[3] R. 16809. Chart V-A at App. II, 1064, shows graphically which companies received Institute rate books and which did not, and also shows the nature of use by those who received them. For a digest of the evidence see App. II, 1063-1112.

[4] Act of June 11, 1946, Public Law 404, 79th Cong., 2nd Sess. 5 U. S. C. A. Sec. 1009 (e).

published for the Rocky Mountain and Pacific Coast areas and even in the areas for which they were published many respondents did not subscribe for them or receive them.[5]

The rate books of the Cement Manufacturers Protective Association which the Commission finds were "in much the same form" as those "supplied by the Institute" were used for precisely the same purpose. And the evidence relied upon by the Commission here is of precisely the same character as that which was urged upon this Court in the first *Cement* case.[6]

This Court had the following to say about the freight rate books in the first *Cement* case:

> "The custom in the cement trade of selling cement at a delivered price which includes the mill price; the price of bags and freight charges, was an established trade practice before the organization of the defendant association. As required by the by-laws of the defendant association, it has distributed to its members freight rate books, listing freight rates from established basing points[7] to practically every city and town in the northeast section of the United States. The freight rates contained in the freight rate book are compiled from the official tariffs and translated from the rate per ton of the official tariffs into the rate per barrel of 380 pounds, the unit for the sale of cement. Similar lists of freight rates embracing substantially the same subject matter were prepared and used by individual manufacturers before the organization of the defend-

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[5] See footnote 3, p. 61, *supra*.

[6] See Brief and Argument on Behalf of the Government, *C. M. P. A. v. U. S.*, Sup. Ct., Oct. Term, 1924, No. 551, pp. 111-127.

[7] The Institute books were not limited to rates from basing points. See App. II, 998-1000, 1022, 1024 and Fdg. 8 (f) R. 16012.

ant association.[8] The Association freight rate book took the place of previous separate publications by individual manufacturers, with a consequent saving of money and increase of accuracy and a more thorough and continuous checking of rates.[9] The basing points from which freight rates were calculated were not selected by the Association, but were the same as those appearing in prior books published by individuals before the publication of the Association freight rate book.[10] The basing points are points of actual shipment from which the larger proportion of the cement in a given locality in which cement is manufactured is actually shipped.[11] The rates published are the actual rates omitting fractions of cents between the basing points and actual points of delivery.[12]

Manufacturers customarily and for the purpose of the convenient conduct of their business, maintain a uniform base or factory price, so far as the customers of the individual manufacturer are concerned. That is to say the business is conducted on a 'one-price' basis. In order, however, to determine the delivered price, there must be added to the factory price of a given manufacturer, the cost of transportation to the point of delivery. Prompt quotations of a delivered price therefore involves the ability to carry out promptly the mechanical process of adding

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[8] Similarly in this case. See App. II, 1001-07.

[9] Similarly in this case. See App. II, 1112-21.

[10] The points of shipment listed in the Institute books were made up originally by and changed in accordance with the requests of individual members. App. II, 1022-30.

[11] Similarly as to the points of shipment listed in the Institute books. See App. II, 1022.

[12] Similarly in the Institute books. See App. II, 1020-22, 1031-37.

to the mill price, the cost of transportation to the point of delivery. Lists of freight rates, in convenient and readily available form, are therefore necessary adjuncts to the quotation of delivery prices for cement.

The use of basing points for the purpose of computing freight rates appears not to have been the result of any collective activity on the part of defendants or cement manufacturers generally, nor were they arbitrarily selected.[18] Their use is rather the natural result of the development of the business within certain defined geographical areas. When a manufacturer establishes his factory at a given point of production and sells his product in a territory which is contiguous freightwise to his factory, other mills established in the vicinity and serving the same territory, in order to compete in that territory, must either secure a like freight rate or they must sell at a mill price which will permit them to deliver cement at a price which will enable them to compete with the mill or mills located at the basing point which is the principal point of production in the territory which is contiguous in point of freight rate to the basing point. If such competing mills secure the same freight rate through the adoption of a blanket freight rate by the Interstate Commerce Commission, as was done in the Lehigh Valley, the rate from the basing point would in every case be identical with the freight rate for the competing mills. If there were no blanket freight rate the com-

[18] Similarly there is no finding here as to any collective activity in the use or selection of basing points. In this connection the Circuit Court said: "It is also material to note that the basing points from which the freight rates were calculated were not selected by the Institute, and each member of the Institute was free to use or not to use this freight rate service" (R. 16809).

peting mills must still use the rate from a given basing point in order to compete with the mills located in the vicinity of that chief point of production. In either case the freight rate from the basing point is an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement. The freight rate book, therefore, not only enables the manufacturer to calculate a delivered price on the basis of his own mill price, which he determines, to points in the territory nearest in point of freight rate to his own mill, but it enables him also to determine at once the freight differential which he must offset in his mill price in order to compete with other manufacturers serving any other given territory" (pp. 597-99).

It is interesting to note that whereas Mr. Justice Stone found that the rate books enabled a cement producer "to compete", the Commission argues here that they are instruments of collusion.

The only other evidence referred to in the findings as to the sinister purpose implied in the use of freight rate books consists of the views of the respondent Lone Star as to the value and use of the rate books.[14] This is the same kind of evidence which this court dismissed without mention in the first *Cement* case.[15] Moreover, here, Lone Star's views alone are relied upon not to show the purpose of Lone Star, but to show the purpose of seventy-three other producing respondents with no other connection than that they

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[14] Fdg. Par. 8 (d), R. 16009-10, App. II, 1080-83.

[15] See footnote 6, p. 62, *supra*.

were all once members of the Institute. We submit that this has no valid basis in law.

United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344, 393-96 (1922);
United States v. *Peoni*, 100 F. (2d) 401, 403 (CCA 2nd, 1938).

On this same subject of common purpose among the respondents, what of the eighteen respondent producers in Washington, Oregon, California, Idaho, Montana, Wyoming, Colorado and Utah, in whose districts Institute Rate Books were never provided?[16] And what of the other six respondents in other areas who did not choose to receive Institute books, although available in their Districts?[17] Here as elsewhere when the evidence refutes the Commission's theories the Commission disposes of it by ignoring it in its findings.

And in the same connection what of the overwhelming body of unimpeached evidence produced by respondents as to the economy in dollars and cents and in time to the individual company in having accurate rates in this convenient form?[18] Mr. Justice Stone thought this of sufficient importance to refer to in his opinion in the first *Cement* case quoted above.

We may pass with little comment the findings respecting the conversion tables which appeared in some Institute rate books, transposing the tariff rates which appear in cents per cwt. into cents per barrel. The Commission mentions this without comment in Par. 8(e) (R. 16011-12) of the findings

[16] See Chart V-A, App. II, 1064.
[17] *Id.*
[18] App. II, 1112-21.

apparently as the excuse for the reference to an "artificial freight rate factor" in Fdg. 8 (g) (R. 16012-13). The same point was made by the government in the first *Cement* case,[19] and noted in Mr. Justice Stone's decision in the portion quoted above. The differences caused by dropping fractions are trivial. The evidence on the subject is digested in App. II, 1031-37. If the rate books are evidence of conspiracy the presence or absence of the conversion table hardly seems material. But if the table is material, then it should be noted that the conversion tables represented a practice many years old. And they had been eliminated altogether before the complaint was filed in this case.[20] The Commission's brief recites a finding that nevertheless the same method of converting rates has been continued (p. 71, fn. 40). It is to be noted that this finding says nothing about any agreement to continue and, typically, omits to mention "continued" by whom.

The Commission also makes some point in its findings of the dissemination of land grant freight rates by the Institute for a period of one year, from January 1936 to January 1937[21] (Fdg. 8 (h), (m)-(n) R. 16013, 16018-21). We submit that if there is no illegality in the freight rate books there is none in the land grant rate service. The two were alike.

This service was terminated in January 1937 for reasons stated in a letter from the General Manager of the Institute to all members which reads in part as follows:

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[19] See Brief and Argument on Behalf of the Government, *C. M. P. A.* v. *U. S.*, Sup. Ct., Oct. Term, No. 551, pp. 121-23.

[20] See Fdg. 8 (e), R. 16011-12; App. II, 1031-33.

[21] The evidence on the subject is collected in App. II, 1132-1154.

"At the outset it was hoped that the exchange of such information would result in a file of reliable factual information—that it would constitute a compilation of actual land grant rates which might be of general value since no such compilation existed.

Since the emergency freight charges expired on December 31, 1936, all past information about land grant rates is probably inaccurate today. This change provides the occasion for terminating the experiment which The Institute has been conducting during the past year. Furthermore, the elimination of this service regarding land grant rate information fulfills the intention of the Board of Trustees, as expressed at its last two meetings that current service of The Institute should not exceed those services which had been approved by the U. S. Supreme Court in the case of Cement Manufacturers Protective Association v. United States (1924—268 U. S. 588).

Accordingly, the General Manager has instructed the Freight Rate Bureau of The Institute to cease transmitting to the members any information regarding land grant rates."[22]

We may appropriately ask whether this sounds like the machinations of conspiracy.

4. Specific Job Contracts.

The Commission's findings respecting specific job contracts and the service rendered by the Institute in checking and reporting on such contracts are similar to the arguments of the government in the first *Cement* case.[1] The matter is set forth in Fdg. 13 (a) (R. 16059-60) followed by a de-

[22] Com. Ex. 885-2R; see App. II, 1148-49.

[1] See 268 U. S. 588, at 592.

scription of the service in Fdg. 13 (d) R. 16061.[2] The Commission refers to these findings in its brief at page 94, footnote 57.

In the first *Cement* case, Mr. Justice Stone pointed out that the government's contention "centered upon the use of the specific job contract by defendants and their activities in connection with such contracts" and then had the following to say about the specific job contract service of the CMPA:

> ". . . The two essential elements in the conspiracy to restrain commerce charged therefore are (a) the gathering and reporting of information which would enable individual members of the Association to avoid making deliveries of cement on specific job contracts which by the terms of the contracts they are not bound to deliver, and (b) the gathering of information as to production, price of cement sold on specific job contracts and transportation costs, not differing essentially from similar information disseminated by the Maple Flooring Association which is the subject of the opinion in *Maple Flooring Association* v. *United States*, decided today, *ante* p. 563.
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> That a combination existed for the purpose of gathering and distributing these two classes of information is not denied. That a consequence of the gathering and dissemination of information with respect to the specific job contracts was to afford to

[2] The evidence on the subject is digested in App. III, 1878-1926. Com. Exs. 3192 and 3193 quoted in Par. Thirteen (c) of the Findings, R. 16060-61, were Gov't Exs. 243 and 245 in the first *Cement* case and were quoted in the government's Brief in the Supreme Court, (pp. 73-77) and the government there argues that "the primary object" of the contract service was to enable the manufacturer to control the price of cement and "prevent competition among the manufacturers as to its price" (pp. 79-80).

manufacturers of cement, opportunity and grounds for refusing deliveries of cement which the contractors were not entitled to call for,—an opportunity of which manufacturers were prompt to avail themselves—is also not open to dispute. We do not see, however, in the activity of the defendants with respect to specific job contracts any basis for the contention that they constitute an unlawful restraint of commerce. The Government does not rely on any agreement or understanding among members of the Association that members would either make use of the specific job contract, or that they would refuse to deliver 'excess' cement under specific job contracts. Members were left free to use this type of contract and to make such deliveries or not as they chose, and the evidence already referred to shows that in 1920 padded specific job contracts were cut down something less than two-thirds of the total amount of the padding, as a result of the system of gathering and reporting this information. It may be assumed, however, if manufacturers take the precaution to draw their sales contracts in such form that they are not to be required to deliver cement not needed for the specific jobs described in these contracts, that they would, to a considerable extent, decline to make deliveries, upon receiving information showing that the deliveries claimed were not called for by the contracts. Unless the provisions in the contract are waived by the manufacturer, demand for and receipt of such deliveries by the contractor would be a fraud on the manufacturer; and, in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon com-

merce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound." (268 U. S. at pp. 602-604)

Now what is different in this case? The first principal difference is that the prices at which the contracts were made were reported in the *CMPA* case and were not reported in the Institute service.[3] If the Institute had as its purpose maintaining delivered prices is it not reasonable to infer that it would have required prices to be reported as it had a lawful right to do under the decision in the first *Cement* case? Not having done so is it not reasonable to infer that respondents had no such purpose? Certainly the fact that manufacturers benefitted from the service in preventing buyers from fraudulently holding cement in the manufacturer's bins for their account at lower prices is no evidence of such a purpose. The Commission finds that if what Mr. Justice Stone describes as a "fraud on the manufacturer" is not prevented, "it affects the respondents' ability to control the delivered price of cement and tends to disrupt the market and break down the uniform delivered price established pursuant to the multiple basing point formula" (Fdg. 13 (a) (R. 16059-16060). It may be observed that any effect of the contract service would be the same whether the prices were determined by a basing point or any other method, or whether prices were quoted f.o.b. mill or f.o.b. destination. The effort here to connect the service with a basing point system and its maintenance is frivol-

[3] See Brief and Argument on Behalf of the Government, *C. M. P. A.* v. *U. S.*, Sup. Ct., Oct. Term, No. 551, pp. 87-90. The government there argued that the CMPA reports were "equivalent to reporting prices to dealers" (p. 87). See also App. III, 1891-95.

ous and unsupportable. And Mr. Justice Stone held that such an activity was lawful "even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price" (268 U. S. 588 at p. 604).

The Commission finds, however, that "collective action and the pressure of collective opinion were exerted" to bring about contract cancellations of excessive or duplicate contracts (Fdg. 13 (e) (f), R. 16061-64).[4] This finding is not supported by the evidence. The excerpt from Com. Ex. 604 A cited in Fdg. 13 (e) merely indicates that the subject of "cancelling" contracts "that were found to be without proper supporting evidence" was discussed. Com. Ex. 604 A is *not* a copy of minutes, as stated in the findings. It is a report by Hogan of Lone Star to his employer. The whole purpose of the service was to enable members to cancel contracts, which were duplicated or padded (See *Cement Manufacturers Protective Assn.* v. *United States*, 268 U. S. 588 at p. 596-597). That the nature of the discussion related to the efficacy of the Institute service, rather than to any collective pressure on any respondent is shown by the rest of Hogan's report, the whole reading:

[Italicized part quoted in Fdgs. Par Thirteen (e).]

> *"The principal subject discussed was the matter of checking contracts and cancelling any that were found to be without proper supporting evidence.*
>
> It developed that the work of the Institute so far has proved quite helpful and that a great many false contracts have been cancelled. It was the consensus

[4] On the basis of similar evidence the government claimed this in the first *Cement* case. See Gov't Brief, pp. 107-110 and Petition For Rehearing (p. 21.)

> of opinion of all those present that the good work should be continued and remaining false contracts cancelled out, if possible" (App. III, 1915).

We may dismiss the evidence cited by the Commission showing the effectiveness of the Institute service in terms of barrelage cancelled (Fdg. 13 (e), R. 16061-62), by noting that similar effectiveness of the CMPA service did not then shock this Court. Mr. Justice Stone said:

> "In 1920, of 1,392 contracts investigated and found to be 'padded' to the extent of more than 3,500,000 barrels of cement, 978 were partially cancelled to the extent of 2,014,653 barrels." (268 U. S. at p. 597)

We submit also that the Institute action shown by Com. Exs. 1014 and 1015 A-C cited in Fdg. 13 (f). (R. 16062-64) does not go beyond the legal bounds of reporting information authorized by the first *Cement* case. As to the instances cited, Reiter, Manager of the Institute, testified he did not consider that the Institute was giving "advice" about the absence of obligation to fill a contract but that "I consider it an opinion of ours based on the facts stated ahead of that statement" and questioned by the Trial Examiner testified:[5]

> "Trial Examiner Norwood: In case where it is found that there was duplication what did the Cement Institute do about it?
>
> The Witness: They did nothing except to report whatever information the field engineer checked in the field; sometimes a check, Your Honor, would tell

[5] See App. III, 1906-12, where this evidence and what follows is set out.

him that he purposed to use a certain brand of cement. When that was told him he reported it to us and we reported it to all members owning contracts duplicated on that job." (R. 5324-25)

and further:

"Q. Now, was it, and did you consider it as such as being any concern of the Institute whether or not member companies relayed information contained in the daily summaries to their salesmen? A. No, it was no concern of The Cement Institute whether or not they did so.

Q. Well, were member companies obligated in any way to send on information contained in this form 3 to their men in the field? A. They were not obligated to do so; no, sir.

Q. Did The Cement Institute have any authority in any way with reference to the contract obligations of its members? A. No. (R. 5318)

• • • • •

The Cement Institute, to my knowledge, took no action of any kind to cause or persuade any member of the Institute to either cancel or refrain from cancelling any contract. . . ." (R. 5327-28)

Reiter's letter to the respondent Pittsburgh, quoted in the Fdg. 13 (g) (R. 16064-65) confirms this, although the Commission in this, as in other instances, has no difficulty in torturing the expressed purpose to avoid misrepresentation into an admission of guilt.

This leaves the letter written by William Jennings, Sales Manager of Southwestern at its Osborn, Ohio mill, which is quoted in part in Fdg. 13 (e) (R. 16062). This letter stands alone and uncorroborated. It is the only item of evidence upon which the Commission can claim support for

its finding on this subject and we submit it is not substantial evidence from which to attribute any connection of the contract service to the maintenance of any pricing method, or upon which to sustain any finding that the seventy-four respondents were engaged in an illegal activity. And significantly, the Commission makes no finding on the basis of the related evidence that the contract service was subsequently discontinued and was not resumed until the time of the N. R. A. Code in 1933, that thereafter there is no evidence to suggest any similar performance and that the service was abandoned altogether in 1936.[6]

5. *The Compendium.*

In December 1935 the Board of Trustees of the Institute approved the issuance to the members, without comment, of a document called a "Compendium of Established Terms and Marketing Methods".[1]

The findings respecting the Compendium recite two of its provisions, one which stated that specific sales orders and contracts "contain definite statements of price, quantities, terms of payment, time and place of delivery and all other terms of sale necessary to form a complete and unambiguous contract" and the other, similar to the Code of Ethics provision, designating diversion of cement in transit as an "unfair trade practice"; and the findings also refer to provisions of the sales contract "recommended in the Compendium" (Fdg. 7 (q), R. 16003-04).

[6] App. III, 1901-02.

[1] All the material evidence respecting the issuance of this document and the conduct of the respondents respecting it is set forth in App. III, 1850-73.

The evidence shows that the Compendium arose out of appeals to industry by government agencies when N. I. R. A. was held invalid in the *Schechter* decision on May 27, 1935 to "cooperate in maintaining those standards of fair competition in commercial and labor relations . . . which represent a united effort to eliminate dishonest, fraudulent trade practices and unfair competition", pending new legislation.[2] In July 1935 a committee of the Institute, under supervision of counsel, drafted trade practice rules which were set out in the form of the Compendium.[3] When it became clear that a new N. R. A. in any form was dead, the document was revised and sent to the members by the trustees of the Institute without comment in December, 1935. The minutes of the trustees' meeting show that the trustees approved the Compendium "as representing the best practices now prevailing in the Industry and as such to be submitted to each member company". A provision which called for price filing had been deleted.[4] The Commission made no finding of these uncontradicted facts.

The Compendium did not mention or deal with delivered prices, basing points, or any other matters relating to price except in so far as the form of sales contract included in the Compendium takes cognizance of the general practice of using delivered prices (See Fdg. 7 (q), R. 16003-04).

The same argument with respect to the provision respecting diversion of cement in transit, set out at pages 55 to 59, *supra*, in connection with the Code of Ethics, is applicable here.

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[2] App. III, 1818-21, 1850-51.

[3] *Id.*, pp. 1850-60.

[4] *Id.*, p. 1851.

The Compendium was in no sense an agreement. There was nothing whatever in it or connected with it to suggest or require anything less than wholly independent action by any member of the Institute.[5] As a matter of fact the Compendium itself stated that marketing policies varied in different sections of the country and that the practices referred to in the document were merely practices which appeared generally to prevail in the cement industry.[6] There is not a line of evidence that any respondent changed or varied any of its practices to conform with practices set out in the Compendium. The only evidence on this subject is to the contrary.[7] As to the only respondents concerning which there is evidence on the point, the practices referred to in the Compendium were policies or practices which they had been following for many, many years.[8] As to the others there is nothing to show that they changed any practice or that they even used any of the practices mentioned.

It is also not without significance, although the Commission makes no mention of the fact in its findings, that beginning in December, 1935 immediately after the Compendium was distributed the activities of the Institute were curtailed and limited to the following:

(1) Statistics on production, shipments, and stocks on hand;

(2) Compilation and distribution of freight rate books (and the land grant rate service for one year until January, 1937);

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[5] App. III, 1852-60.

[6] *Id.*, p. 1852.

[7] *Id.*, pp. 1862-73.

[8] *Id.*, pp. 1864-73.

(3) Specific job contract information which was discontinued in September, 1936; and

(4) Certain specified general office activities including the distribution of information to members on pending or recently enacted legislation and Governmental regulations.[9]

These, with the omissions noted above, were the only activities of the Institute from December, 1935 to and including July, 1937, when the complaint in this case was filed.

We submit that in none of these activities when all the facts are known is there evidence as required by the Act to support a finding of conspiracy.

6. *Factual Summary as to the Institute.*

1. It was organized to do and did exactly what this Court held to be proper in *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588. This is clear from the chart (p. 44, *supra*) showing its activities from the date of its organization to the date of the complaint. At different times it disseminated information concerning credits, bag returns, closed specific job contracts, statistics on production, stocks on hand and shipment, and it published freight rate books.

2. At the time of its organization it prepared a Code of Ethics for submission to the Federal Trade Commission in a Trade Practice Conference. This was at the invitation of Federal Trade Commissioner Humphrey. When the Trade Practice Conference did not materialize the Institute virtually collapsed and with it the Code of Ethics (App. III, 1798-1801; 1808-1812, 1835). But, in any event, the provi-

[9] App. III, 1821-24.

sions of the Code of Ethics were counterparts of then existing rules approved by the Commission at Trade Practice Conferences in other industries.[1]

3. In June, 1933, at the time of the National Industrial Recovery Act the Institute was revived, its membership reached its highest point of 79 companies and it prepared and submitted to the President of the United States a proposed N. R. A. Code for the industry. Whatever it proposed in the Code it had the right to propose and the Code as adopted had the approval of the President of the United States (App. III, 2099-2103).

4. After N. R. A. the Institute trustees gave approval to the Compendium of Established Terms and Marketing Methods—which consisted of a statement of then existing general practices and acknowledged that practices differed in different parts of the country. The Commission is unable to point to a single practice of any company that was changed or controlled as a result (App. III, 1850-1874).

The lower court also pointed out some of the things the Institute did not do, as follows:

> "Except for open price filing under the N. R. A. Code and for three months thereafter, there was no exchange of prices or price data among the members through the Institute or otherwise, and the Institute did not receive from members or send out to them any reports as to prices either daily or otherwise. Even in the specific job contract reports, prices were omitted, although the old Cement case held that inclusion of prices in such transactions was lawful. The Institute did not receive or send out any information as to basing points, base prices,

[1] See footnote 5, pp. 53-54, *supra*.

change of mills from non-base to base, or vice versa. Even the freight rate books were not limited to rates from basing points, although under the old Cement case they might have been so limited. The Commission does not find that any pricing practice of the industry generally or that any pricing practice or policy of any respondent was developed or changed by or through membership in the Institute or by or through any act of the Institute. Most important of all perhaps is that there is no finding that the Institute either had or exercised any power or authority or could or did impose any restriction upon the activities of its members" (R. 16772-73).

Further:

"* * * there is no finding in the instant case that the Institute had any power or authority to enforce its recommendations or to penalize or discipline any members for failure of observance, and no finding that the Institute had anything to do with the fixing or maintenance of prices" (R. 16812).

7. The Law as to the Institute and its Activities.

The lower court correctly applied the decision of this Court in *Cement Manufacturers Protective Ass'n.* v. *United States,* 268 U. S. 588 in its holding that the freight rate service, the specific job contract reporting service and other services of the Institute were lawful trade association activities (R. 16772).

Judge Evans, dissenting, in considering Institute activities, found fault only with the freight rate service (R. 16819) and this was a lawful activity under the decision in the first *Cement* case, as the majority below held.

In short, then, as already stated we have a trade association, otherwise lawful, which may at worst be said to

have conducted its affairs in the setting of the customs that existed in the trade and to have taken no affirmative action to change those customs.

We have found no case in any District or Circuit Court, and there has certainly been none decided by this Court in which illegal purpose or action has been predicated upon such a tenuous premise. In fact, the trade association purposes and activities approved by this Court have, in every case, involved far more than those upon which the Commission predicates illegality here.

See:

Maple Flooring Manufacturers Association v. *United States*, 268 U. S. 563 (1925);

National Association of Window Glass Manufacturers v. *United States*, 263 U. S. 403 (1923);

Sugar Institute, Inc. v. *United States*, 297 U. S. 553 (1936);

Appalachian Coals, Inc. v. *United States*, 288 U. S. 344 (1933).

In the most recent pronouncement of this Court on the subject—the *Sugar Institute* case, *supra*,—the validity of historical trade practices is expressly recognized throughout the opinion[1] and the recognition of such practices by a trade association was not there condemned. This question was squarely raised and decided. There, this Court adverted to the defendants' argument on the point and said:

"In determining the relief to be afforded, appropriate regard should be had to the special and historic practice of the sugar industry. The restraints,

[1] 297 U. S. at pp. 579, 581, 584-585, 588, 591-594, 599-602.

> found to be unreasonable, were the offspring of the basic agreement. The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, *but in the steps taken to secure adherence*, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be * * *" (p. 601. Italics ours.)

And the emphasis throughout the Court's decision is upon "restrictions imposed by the Institute,"[2] "policing,"[3] "recommendations of the Institute concertedly observed,"[4] "obligation to adhere,"[5] "rigid enforcement,"[6] "steps taken to secure adherence."[7] We have none of these here. Nor do we have here as in the *Sugar* case findings which "subjected the evidence to a thorough and acute analysis which has left but slight room for debate of matters of fact."[8]

The lower court was fully aware of the difference between lawful and unlawful trade association activities.

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[2] 297 U. S. 589.
[3] 297 U. S. 590, 591.
[4] 297 U. S. 591.
[5] 297 U. S. 593.
[6] 297 U. S. 593.
[7] 297 U. S. 553, 601.
[8] 297 U. S. 553, 601.

Shortly before its decision in these cement cases it had sustained two Federal Trade Commission orders directed against trade association activities, *United States Maltsters Association* v. *Federal Trade Commission*, 152 F. (2d) 161, (C. C. A. 7th, 1945) and *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. (2d) 478, (C. C. A. 7th, 1946.) In both cases the trade associations were engaged in price reporting activities of a comprehensive sort and it is no wonder that in both cases the Commission made a clear finding of a price-fixing agreement among the members and that the findings and order were sustained by the court below.

D. Nationwide Conspiracy as Charged is Not Shown in the Findings and Proof in so far as They Show Any Concurrent Use of a Multiple Basing Point System of Pricing.

The Commission failed in its proof of agreement in these cement cases and in the court below it was driven to the position that the alleged "multiple basing point system" was "inherently collusive" and thus illegal per se.[1] Despite disavowals made in an obvious attempt to discredit the court below,[2] that same position is now taken in different words, as follows:

> "A second preliminary question is whether the system of pricing cement used by respondent producers in fact eliminates price competition among

[1] In its brief below the Commission declared that the alleged system was "inherently collusive, oppressive, and unfair" (Commission brief below, page 45) and that this was "the theme" (*id.*, page 51) of the section of its brief (*id.*, pages 45 to 123) dealing with this subject. The legal propositions that this alleged system is illegal per se were stated at *id.*, page 29.

[2] See Com. brief, pages 122-123.

them, irrespective of whether or not there is combination or implied agreement on their part not to compete in price and to use this pricing system" (Com. brief, pp. 37-38).

This question is then argued at pages 42-49. The point there argued is repeated throughout the brief and is explicitly stated in connection with the meaning of the Commission's order, that is, that the order bars concert of action in the continuance of this alleged system "which necessarily operates to suppress price competition" (Com brief, p. 122).

We argue the law point that the marketing methods in this industry are not illegal per se at pages 142 to 145 below. In subheadings 1 through 7 below, we present the facts showing the variety of marketing methods that exist in this industry and challenge the Commission's inadequate findings on this subject.

The Commission's argument in its brief, pages 39, 42-49, as to the so-called multiple basing point system and the "formula" proceeds on assumptions unsupported by the findings or proof. At page 39 the statement is made that respondents have agreed "to sell on a delivered price basis". As already noted (*supra* p. 24) and as we shall see later, pages 89-91, 102--103, 112-119 below, there is neither proof nor finding to support that statement. The proof is to the contrary.

On page 39 it is also said that "the essence of respondents' pricing system was a formula which designated the price leader for any and every point in the United States and provided that all others should adopt as their own the price of the price leader". There is a finding of a "formula", which we challenge at length at pages 89 to 102 below, but it is not a finding of the "formula" stated in the Commission's brief in the words quoted above.

The argument as to the alleged "formula" is elaborated at pages 42-49 of the Commission's brief and it is always based on the unsupported assumptions contained in the statement quoted above. In addition the Commission's brief, page 45, recites findings which flatly misstate the provisions of the Code of Ethics, see our argument at pages 52 to 59 below.

The Commission throughout its brief seeks to create the impression that the assumed "formula" is used in all markets and is the inevitable cause of uniformity of price. We present our challenge to the findings on this important subject at pages 125 to 142 below.

1. Cement is Customarily Sold at Delivered Prices: the Market is at the Destination.

The buyer of cement buys on the basis of the laid down delivered cost to him at the place of use. This fact was conceded by Commission's counsel at the hearings and the Trial Examiner excluded, as cumulative, additional evidence to like effect.[1] The record shows this to be so even when prices are quoted f.o.b. mill.[2] Cement executives testified that the "market" for cement is at the point of use and not at the mill.[3]

The lower court pointed out that the Commission "substantially corroborates" (R. 16766) this point in Par. 7 (a) of the findings. Par. 7 (a) reads in part as follows:

> "Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price; that is, at a price determined by the location

[1] App. I, 177-180.

[2] *Id.*, pp. 172-174, 181-183; App. II, 918-925.

[3] *Id.*, 181-201.

at which actual delivery of the cement is made to the purchaser * * *" (R. 15988).

In fact, at the oral argument below it was conceded by counsel for the Commission "that it is sold on this basis as a result of the demand of the buyer" (R. 16786-87) and the lower court added that "the dealers whom the Commission characterizes as the 'backbone' of the business insist on knowing how much it will cost delivered" (R. 16786).

In the first *Cement* case, decided June 1, 1925, Mr. Justice Stone said that "The custom in the cement trade of selling cement at a delivered price which includes the mill price, the price of bags and freight charges, was an established trade practice before the organization of the defendant association" (268 U. S. 588 at p. 597). That association (Cement Manufacturers Protective Association) was organized in 1916. The custom so described is still the custom in the cement trade and it has existed for forty years and more.[4]

2. *The Spread and Number of Base Mills.*

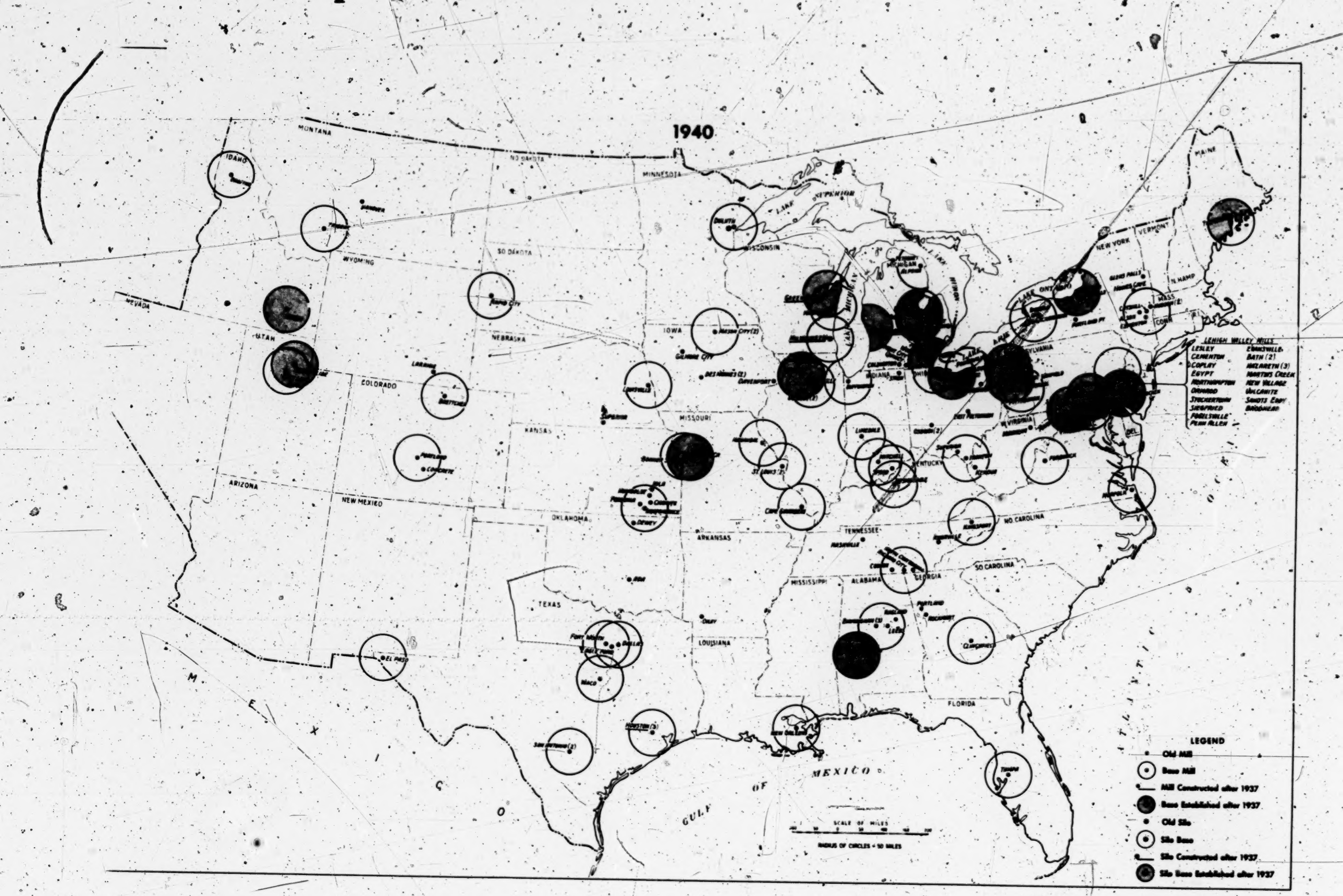
We reproduce here the last of a series of five charts, all of which appear in Appendix A[1] showing the spread of base mills throughout the country east of the three Pacific Coast states in 1915, 1920, 1925, 1937 and 1940.

The chart here reproduced shows that at the close of the taking of testimony in this case on November 29, 1940 there were 138 cement mills and 15 packing plants oper-

[4] The evidence in the present record showing the origin of this custom, the factors that brought it about and the extent of the use of delivered prices in more recent years is digested in App. I, 97-201.

[1] App. I, Charts II D, E, F, G and H at pp. 364-368. The supporting data in the record from which these Charts were made is in App. I, 369-389.

1940


MONTANA
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IDAHO
WYOMING
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NEBRASKA
NEVADA
UTAH
COLORADO
IOWA
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KANSAS
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NEW MEXICO
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LOUISIANA
MISSISSIPPI
ALABAMA
GEORGIA
TENNESSEE
KENTUCKY
ILLINOIS
INDIANA
OHIO
MICHIGAN
WISCONSIN
NEW YORK
VERMONT
MAINE
PENNSYLVANIA
VIRGINIA
NO CAROLINA
SO CAROLINA
FLORIDA
MEXICO
GULF OF
ATLANTIC
LEHIGH VALLEY MILLS
LESLEY
CEMENTON
COPLAY
EGYPT
NORTHAMPTON
ORMROD
STOCKERTOWN
SIEGFRIED
PORTLAND
PENN ALLEN
EBENSBURG
BATH (2)
NAZARETH (3)
MARTINS CREEK
NEW VILLAGE
UNIONVILLE
SAUCON EAST
BROADHEAD
SCALE OF MILES
RADIUS OF CIRCLES = 50 MILES
LEGEND
Old Mill
Base Mill
Mill Constructed after 1937
Base Established after 1937
Old Silo
Silo Base
Silo Constructed after 1937
Silo Base Established after 1937

ating in the area east of the Pacific Coast. Of these, 96 were base mills, 15 were base packing plants and 16 were mills located within 50 miles[2] of one or more of the base

[2] As to many of these 16 mills the record shows that in many cases rates are identical with and often they are even higher than the rate from the base mill.

(a) Mills within 50 miles of Ironton, Ohio base mill:

(i) Superior, Ohio: To about 53% of 1827 carload freight stations in Ohio, rates from Superior are identical with rates from Ironton. To the balance the rates are from 4¢ to 6¢ per barrel higher or lower than the Ironton rate (Com. Ex. 1110 W: Institute Ohio rate book).

(ii) Kenova, West Virginia: The Kenova rates are identical with Ironton's rates to about 67% of the carload stations in Ohio. To the balance the rates are 2¢ to 4¢ per barrel higher or lower than the Ironton rates (Com. Ex. 1110 W).

(b) Mills within 50 miles of Cleveland, Ohio base silo:

(i) Painesville, Ohio: The Painesville rates are 2¢ to 8¢ per barrel higher than the rates from Cleveland to about 91% of the 1827 carload stations in Ohio. To the balance they are the same or from 2¢ to 4¢ per barrel lower (Com. Ex. 1110 W).

(ii) Middle Branch, Ohio: The Middle Branch rates are from 2¢ to 10¢ per barrel higher than the Cleveland rates to about 45% of the Ohio stations. To about 20% they are identical and to about 35% they are from 2¢ to 10¢ per barrel lower than the Cleveland rate (Com. Ex. 1110 W).

(c) Mills within 50 miles of the base mill at Wyandotte, Michigan:

(i) Detroit, Michigan: To about 45% of the 1116 carload stations in Michigan (Lower Peninsula) the rates from Detroit are identical with the Wyandotte rates. To about 6% they are 2¢ to 15¢ per barrel higher and to about 49% they are 2¢ to 6¢ per barrel lower than the rates from Wyandotte (Com. Ex. 1110-L: Institute's rate book for Michigan).

(ii) Cement City, Michigan: The Cement City rates are identical with the Wyandotte rates to about 20% of the stations. To about 30% they are 2¢ to 10¢ per barrel higher and to about 50% they are 2¢ to 11¢ per barrel lower than the rates from Wyandotte (Com. Ex. 1110-L).

(d) Eagle Ford, Texas is within 50 miles of the base mills at Fort Worth and Dallas, Texas. To about 70% of the 3214 carload

mills or packing plants. This total of 112 mills and 15 packing plants, scattered in thirty six states, represents 86% of the total productive capacity in this area.

As to the 18 mills and 4 packing plants of respondents in the three Pacific Coast states the lower court points out that "counsel for the Commission conceded in oral argument that all of the Pacific Coast mills were base mills" (R. 16788).

On this subject Par. 7 (b) of the findings states that:

> "Approximately half of the mills operated by the corporate respondents have base prices and are known as base mills. The other mills which have no base prices are known as non-base mills. * * *" (R. 15988-89)

The lower court correctly pointed out that "neither in this finding nor in any other is it revealed which mills are base and which are non-base" (R. 16787) and then stated that the statement made above as to the number of base and non-base mills was not denied by the Commission (R.

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stations in Texas, rates from Eagle Ford are identical with the rates from Fort Worth or Dallas. To about 29% they are 2¢ to 10¢ per barrel higher than the rates from either base mill. To the balance the rates from Eagle Ford are lower than those from Fort Worth or Dallas but are higher than the rates from the base mills at Waco, San Antonio and Dallas, Texas (Com. Ex. 1110 BB; Institute Rate Book for Texas).

(e) The rates from West Penn mill at West Winfield, Pennsylvania, are identical with the rates from the base mills at Universal, Pa. or Northampton, Pa. or Buffalo, N. Y. or the base silo at Cleveland, Ohio, to 42 stations. To 195 stations the rates from West Winfield are higher and to 50 stations they are 1¢ to 4¢ per barrel lower than the rates from the four base points mentioned above (Resp. Ex. 1420 A-L).

(f) The rates from the mill at Dewey, Oklahoma to a great majority of destinations are identical with the rates from the base mills at Monarch, Iola and Independence, Kansas (App. I, 425-27).

16787).[3] Here is a striking instance of a finding unsupported by substantial evidence and of a failure to find on the whole evidence dealing with basic and undisputed facts.[4]

3. *The Methods Employed in the Quotation of Delivered Prices: So-Called Base and Non-Base Mills.*

Throughout the history of this industry the method by which the great bulk of cement has been sold is by the simple method of the manufacturer quoting a delivered price made by setting a figure at his mill or packing plant and quoting his customers this amount plus rail freight to destination, wherever the quotation so made makes the lowest quoted price at that destination. In markets where it does not make the lowest quoted price at destination, the manufacturer either lowers his price to meet his competitor's price or stays out of that market. Mills and packing plants that follow this policy are so-called base mills or packing plants.[1] Other mills are price followers and merely

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[3] The Commission in its brief p. 17 and again at p. 111 states that the court below erred in its statement that the Commission did not challenge our statement as to the number of base and non-base mills. The court below was correct. The Commission in its brief below pp. 204-205 merely stated that there was no warrant in the record for treating as base mills, mills located within 50 miles of base mills. The supporting exhibit for our statement is Resp. Ex. 3745. Also, the Commission had no citation for its further statement that rates within a 50 mile radius were not trivial. In response we submitted and submit again in footnote 2 above the facts to show that in many cases rates are identical and often they are even higher than the rate from the nearby base mill.

[4] The whole evidence in the record as to the growth in the number of base mills and the changing status of mills since the turn of the century is digested in App. I, 351-409. See also the charts cited in footnote 1 above.

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[1] App. I, 335-351; 409-425.

ascertain what the going prices at the various destinations within their reach may be and quote those prices.[2] Mills that follow this policy are so-called non-base mills.

In important markets and areas there are other methods that are generally employed. Thus, in all important metropolitan areas east of the Pacific Coast there are flat or zone prices[3]; in many mill switching areas and in areas served by groups of mills there are flat delivered prices[4]; in the important Atlantic port areas there are port price bases and special delivered prices made to meet the competition of imported cement[5]; at one time there was a single delivered price applicable to the whole state of Ohio; at another time the same was true in Michigan and in certain counties in Pennsylvania, Ohio and Kentucky there have been flat countywide delivered prices.[6] The methods employed on the Pacific Coast are described in the separate briefs filed on behalf of Pacific Coast respondents.[7]

Even more important than the diversity of methods shown, is the basic fact that this diversity reveals. That is that the market and market price are always at the destination and the seller in order to compete must always know

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[2] App. I, 312-317; 445-456.

[3] App. I, 557-570.

[4] App. I, 570-576.

[5] App. I, 576-587. Chart II-I, p. 562.

[6] App. I, 587-599.

[7] For the Pacific Northwest see the briefs for respondents Northwestern Portland Cement Co., Case No. 29 and Superior Portland Cement, Inc., Case No. 28.

For Central California see the briefs for Calaveras Cement Company, *et al.*, Case No. 26.

For Southern California see briefs for Riverside Cement Co., Case No. 30, and California Portland Cement Co., Case No. 32.

and at least meet the lowest delivered price there—and it matters not at all how it came to be.

The Commission in its brief, pages 46-47, argues that these diverse methods of price quotation in some way that we are unable to follow emphasize the thesis of the Commission's brief that the "formula" produces identity of price. The assumption is made that these diverse methods exist only where foreign cement is offered in the market but that is not true, as the record shows.[8]

a. How a Base Mill Quotes Delivered Prices.

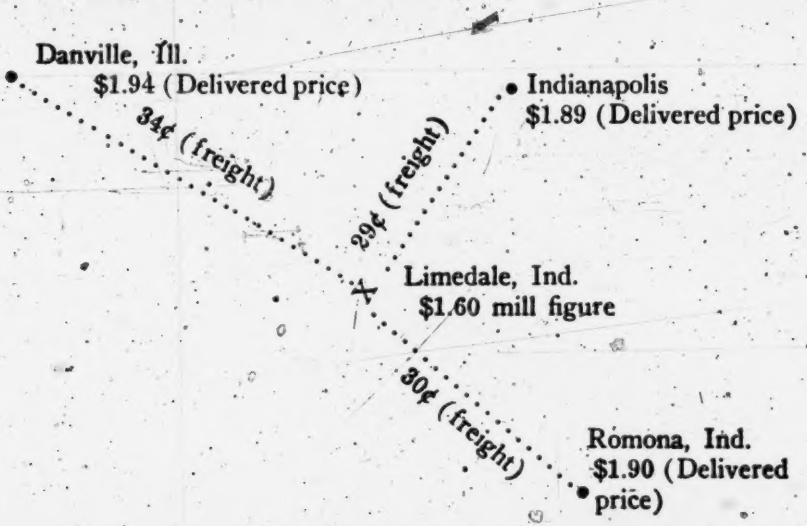
We look now at what a base mill or a base packing plant does when it quotes delivered prices. What is said below applies with equal force to each of the 96 base mills and to each of the 15 base packing plants in the area east of the Pacific Coast.

The record furnishes many examples of what a base mill does when it quotes delivered prices. One will suffice. We take two of the four base mills located in Indiana, one the Limedale (Greencastle) mill of Lone Star and the other the Mitchell mill of Lehigh. In the discussion below we always use actual freight rates and actual prices as they existed in 1937 as shown in the record.

How, then, does the Limedale mill quote its prices? Its largest market is in Indianapolis, 41 miles away, but it sells in other cities as well. The buyer wants to know how much the cement will cost him at the point where he wants to use it, so what does the Limedale mill do when it quotes its prices? It has to know two things (1) what it seeks to net

[8] See footnotes 3, 4, 6 and 7 above.

at the mill for a barrel of cement—say $1.60[1] and (2) what the freight rate is from Limedale to the points where the customers want to buy. From then on it is a problem of simple addition. When these things have been done, this is what the Limedale mill's quotations at only three of many destinations will look like:



There is no claim that there is anything illegal or even subject to criticism about that. As the lower court put it: "We suppose the Commission would not complain of their selling activities up to this point" (R. 16790). All of the 96 base mills and 15 base packing plants sell this way on a large proportion of their sales. Nothing in the order entered against these respondents prohibits this method of

[1] In this example, in order to simplify the discussion we omit reference to the factors of cost, demand and supply and the impact of competitive prices all of which influence the base figure adopted by any mill. The evidence as to this is digested in App. I, 390-398, 409-425, 471-484.

quotation. Most of the Commission's favorite phrases that appear in the findings do not apply but some do.

a. Limedale might be called a "basing point".

b. Limedale's method of marketing might even be called a "basing point system".

c. There is no "varying mill net" (the figure is constant—$1.60).

d. There is no "freight absorption".

e. There is no "phantom freight".

f. There is no "cross hauling".

g. There is no "reciprocal waiver of advantages".

Limedale is simply selling at delivered prices because that is how the customer wants to buy cement. This is hardly evidence of conspiracy or an unfair method of competition.

The mill at Limedale, however, is not alone in its desire to sell cement in the big Indianapolis market and in other markets in Indiana, Illinois and nearby states. It has competitors and one of them is the mill at Mitchell, Indiana, 98 miles south of Indianapolis. Mitchell also established for itself a figure of $1.60 which it seeks to net at its mill.

When the Mitchell mill wants to sell in the Indianapolis market it quickly learns three things: (1) that Limedale is quoting a price in Indianapolis of $1.89; (2) that its own salesmen cannot sell cement for even a penny more than that and (3) that the freight rate from Mitchell to Indianapolis is 36¢ (7¢ more than the rate from Limedale to Indianapolis).

The lower court, in commenting on the situation of these two mills, said:

> "Thus these two competing mills are faced with a simple business proposition which can be solved in one of two ways, as their individual judgment may dictate. Each can confine its sales to the territory in which it has an advantage or can extend its business into the territory of the other. If they follow the former course, as the Commission would require them to do by its order, each will have a monopoly in its own territory and competition will be at an end. On the other hand, if the other course is pursued and they go into the territory where they are at a disadvantage freightwise, they necessarily must meet the price which they find there in order to sell. To enable them to do this, they absorb an amount of freight, necessary to enable them to meet the price which they find. The same necessity which impels them to do this requires a reduction in their mill net in an amount equivalent to the freight which has been absorbed." (R. 16790-91)

Put in another way, the alternatives that confront the Mitchell mill are these:

a. It might stay out of Indianapolis and then there would be no problem. But Indianapolis is a big market. It cannot stay out and still have the volume that it needs to keep its mill operating efficiently. There is not enough business around Mitchell and at other points.

b. It might add its 36¢ freight rate to its $1.60 figure, but this gives $1.96 and Limedale is quoting $1.89. Mitchell must at least meet this price or stay out of Indianapolis.

c. It might, of course, quote a penny or more less than Limedale but then—as soon as Limedale learned of this—

the evidence shows that Limedale would meet the lower price because this is a big market and the price situation would be where it was before only at a lower level.[2] Of course, Mitchell could again reduce its price but there must sometime come an end to such action by Mitchell (as the Commission recognizes in its brief, p. 52) as Limedale will always have a 7¢ freight advantage to the market in question.

d. Mitchell might quote $1.89 at Indianapolis without adding anything to anything or it might figure out how Limedale arrived at the price of $1.89 and arrive at that figure in the same way. In any event in order to sell cement at Indianapolis it just quotes the price it finds in the market (it really does not matter how that price was computed by the company which quoted the low price—it is the price). Subtracting the 36¢ freight rate from the delivered price of $1.89 leaves Mitchell with $1.53 at its mill.

Now what is the situation from the point of view of the Commission?

There is no criticism and no claim of illegality, as we have seen, if Mitchell does what Limedale did when it was alone and there was no competition in the field and it simply added freight to its $1.60 figure at the mill. But if Mitchell does this it cannot sell in the big Indianapolis market! Its price will be 7¢ higher than Limedale's and it simply will not be able to sell any cement. So Mitchell obeys a normal competitive impulse, sacrifices 7¢ from what it would otherwise net at its mill, meets Limedale's price of $1.89 and sends its salesmen out to sell cement. In short, it simply lowers its delivered price to meet the competitive situation that exists.

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[2] App. I, 285-309.

Now that competition has entered the picture we find the Commission is making a charge of conspiracy and a finding of price discrimination in violation of the Clayton Act!

Nearly all of the Commission's favorite phrases now apply:

a. Limedale and Mitchell are each called a "base mill".

b. The Commission might even say that a "basing point system" is now in full swing.

c. Mitchell has a "varying mill net". It nets more at its mill for cement sold in its hometown or at any other destination in the territory where it makes the price than it does for cement sold in the big Indianapolis market or in any other market where its own price base of $1.60 is not effective.

d. There is "freight absorption". This is a concomitant of a varying mill net. That is, Mitchell has to lower its mill net to quote a competitive price in Indianapolis and in so doing it is said to "absorb" the 7¢ difference in freight. If it does not do this then it cannot sell in Indianapolis. Again, Mitchell has simply had to lower its delivered price. As to this, the lower court said:

> "Of course, Mitchell absorbs 7¢ per barrel, but why does it do it? The Commission says to restrain competition, when the plain fact is that it couldn't sell in the Indianapolis market without doing so" (R. 16794).

Perhaps the Commission's chief criticism of Mitchell for having a mill net of $1.60 on business in the territory where it makes the price and of $1.53 on its Indianapolis business is that if it can sell at Indianapolis with a net of $1.53 it ought to be able to sell for this figure in the territory where

it makes the price. There is something very appealing to the Commission about this criticism. Surely cement ought not to net the factory more when it is sold in the territory where it makes the price than when it is sold far afield in Indianapolis. This school-book criticism overlooks the important fact that Indianapolis is a big market and the sacrifice that Mitchell must make to sell there at all, means added sales and added volume and all that those mean in reduced unit cost of production at the factory at Mitchell. It is the lower cost resulting from volume production that enables a price as low as $1.60 plus freight in the territory in which Mitchell makes the price. The lower court in commenting on this point—and as the record shows[3]—said:

> "If it is to be enjoined from absorbing freight in order to reach this market, it is reasonable to think that its unit cost of production at its factory in Mitchell would be considerably increased and the price of cement to its home customers increased accordingly. In fact, Mitchell without the Indianapolis market might not be able to operate. Thus the Commission's solicitude for Mitchell's home customers would in all probability result to their detriment" (R. 16794).[4]

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[3] App. I, 80-85; App. IV, 3101-09.

[4] The Commission in its brief p. 125-126 questions Judge Major's statement and suggests that if the "over-all aspects of the situation" are looked at then the gain of one mill is the loss of another in terms of unit cost of production. This generalization is too easy. The fact is, as already noted pp. 8-10 above, that cement mills are located in proximity to raw materials and raw materials are scattered throughout the country in no pattern of proximity to markets. Freight absorbing sales, as in the case of Mitchell, may be necessary to overcome its disadvantage as against Limedale in the big Indianapolis market. Limedale, too, may have to make freight absorbing sales in markets in which it is at a disadvantage. What has been said may be shown in varying degrees with respect to every mill.

e. There is no "phantom freight". Whatever reality there may be in this curious phrase will be discussed later. Here there is certainly none. Quite the reverse is true. The freight cost of getting cement from Mitchell to Indianapolis is 7¢ greater than it is from Limedale. Mitchell is the loser, not the gainer, by its location and the structure of freight rates.

f. There is no "cross-hauling" but if Limedale sells in territory south of its mill into Mitchell's "home territory" and Mitchell sells cement north in Limedale's territory, then we would have "cross-hauling". It is a safe guess that more moves north to Indianapolis than moves south from Limedale. The Commission criticizes the cement industry for this—as though the industry, short of an illegal agreement, could stop it. It could be stopped if Mitchell gave up its Indianapolis market and other markets north of its mill and Limedale gave up its markets to the south. Why would either take this step? Mitchell certainly would not, because Indianapolis is a big market. And why should Limedale give up any market? Of course there is cross-hauling. That is the price we pay in this country under a free enterprise system with several sellers actively competing in a market. It might be stopped by an illegal agreement in restraint of trade or if the theories of this Commission are accepted. Apart from either of these we will have cross-hauling, as we do throughout American industry. It is only a result of the normal impulse to reach out into new markets.

g. There is no "reciprocal waiver of advantages". The fact that both companies sell in each other's home markets makes this clear. But in addition there is abundant and uncontradicted evidence ignored by the Commission in its findings which shows plainly that the most compelling rea-

son why a mill decides to make itself a base mill is to lower the price in its nearby markets and make them as unattractive as possible to more distant mills.[5] And in 1940 there were 96 mills and 15 packing plants east of the Pacific Coast which had established bases for that very reason. This very multiplicity of basing points shows the extent to which these respondents have *pressed* rather than *waived* their local advantages. This case is a far cry from the "Chicago plus" of the corn products industry in which there was one basing point for the entire country.

h. The Commission in its brief now argues for the first time, pages 16, 39, 42-43, that Limedale is the "governing base" in Indianapolis and that Mitchell and all others must adopt Limedale's price because Limedale is the "price leader" in Indianapolis. There is no finding to support this argument and the proof shows that there is freedom and diversity of action and no pattern of leadership among the many mills throughout this country, each of which is selling in a relatively local market (App. I, 254, 309-317). Limedale is free to lower its delivered price in Indianapolis or any other place, so far as this record shows, at any time it sees fit to do so—and so is Mitchell.

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[5] App. I, 390-98. For example, in 1909 the mill at Hannibal, Mo. put in a base at its mill to reduce prices in the west and keep the older Lehigh Valley mills out of that territory. See the testimony of Blaine S. Smith and of B. F. Affleck at the Wheeler Hearings as to these early bases and the effort of the new western mills to keep Lehigh Valley mills out of their markets, App. I, 121-123, 355-356. Again, when the new mill at Iola, Kansas put in a base there it did so to keep both the Hannibal, Mo., and the Lehigh Valley mills out of territory in which they had sold theretofore, App. I, 356-357. For further evidence on this point see App. I, 357-398, 471-484.

b. How a Non-Base Mill Quotes Delivered Prices.

There are twenty five mills east of the Pacific Coast, representing 14% of the total productive capacity in that area, that were non-base mills as of November 20, 1940, and that are located more than 50 miles from any base mill or silo.[1] The names of the companies and mills which fall in this category, together with references to Appendix A where the facts as to their individual situations are found, are shown in the footnote.[2] The facts as to these mills, in general terms, are as follows:

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[1] The evidence by executives of these mills as to why they are non-base mills and as to their pricing policies is digested in App. I, 398-409, 445-456. These pages also digest evidence relating to mills that are within 50 miles of a base mill. See also App. I, 369, 377, 382, 386, 387, 389.

[2] Reference to Chart II-H on page 368 will show location of mills listed below with respect to the mills of other respondents, particularly base mills and base silos.

Alpha:	Mill at Manheim, W. Va., App. I, 400, 402.
Arkansas:	" " Okay Junction, Ark.
Dewey:	" " Davenport, Iowa, *id.*, 398, 402.
Georgia:	" " Portland, Ga., *id.*, 399, 401.
Glens Falls:	" " Glens Falls N. Y., *id.*, 399, 402, 404.
Hawkeye:	" " Des Moines Iowa, *id.*, 399.
Hermitage:	" " Nashville, Tenn., *id.*, 399, 401, Chart I-G, p. 92.
Monolith Midwest:	" " Laramie, Wyo.
Nebraska:	" " Superior, Nebr., *id.*, 399, 401, 403, Chart I-J, p. 95.
North American:	" " Howes Cave, N. Y., *id.*, 399, 402.
Northwestern States:	" " Gilmore City, Iowa (not operating *id.*, 12)
Oklahoma:	" " Ada, Okla.
Peerless:	" " Port Huron, Mich., App. I, 399, 400, 401, 402.
Penn-Dixie:	" " Portland Point, N. Y., *id.*, 399, 401, 402.

Most of them are small mills located in small and in many cases remote communities removed farther than their competitors from the large consuming areas which they must reach if they are to continue to operate. To sell in these areas they must enter the freight advantage territory of other mills more favorably located freightwise. For them it is an idle gesture in most cases to undertake price leadership. They must live, as best they can, in markets served more easily by other mills and sell their cement at whatever prices they find. Typically they are price followers. Their location deprives them of the opportunity of ever exercising effective leadership in price quotation. In some instances they are surrounded by the base mills of others. In other instances base mills stand between them and their principal markets. Their location has been dictated largely by proximity to raw materials. Others have found raw materials closer to large markets than they have.[3]

Executives of these mills testified that they simply meet prices as they find them in the markets where they sell.

Penn-Dixie	Mill at West Des Moines, Iowa, *id.*
Petoskey:	" " Petoskey, Mich., *id.*, 400.
Pittsburgh:	" " East Fultonham, Ohio, *id.*, 400.
Southern States:	" " Rockmart, Ga., *id.*, 399, 401, Chart I-K p. 96.
Southwestern:	" " Osborn, Ohio, *id.*, 400, 403.
Three Forks:	" " Hanover, Mont. (not operating R. 14970-71).
Volunteer:	" " Knoxville, Tenn. *Id.* 399, 401.
Wabash:	" " Osborn, Ohio.
"	" " Stroh, Ind.
Wolverine:	" " Coldwater, Mich., *Id.*, 403, 405.
"	" " Quincy, Mich., *id.*

[3] The evidence showing these facts is collected in App. I, 62-68; 398-409.

Some testified that it made no difference how these delivered prices were made up, while others testified that after picking up delivered price quotations in the field they traced them back to see what price bases they reflected at surrounding mills and which ones reflected the lowest combination of such price base plus the freight to destination, and then quoted those prices.[4]

4. The Findings as to the Concurrent Use of a Multiple Basing Point System: Important Failures to Find.

As a preface to a consideration of the findings and the argument in the Government's brief on this subject we set down, as did the court below, "certain important facts, not in dispute",[1] as follows:

1. The buyers of cement will not pay a penny more for one brand of cement than for another. The complaint so alleged[2] and the Commission so found.[3] The evidence is overwhelming.[4]

2. There is no exchange of price information between the respondents either through the Institute or otherwise.[5]

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[4] The detailed evidence showing these facts is digested in App. I, 445-456.

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[1] Major, J. at R. 16785-86.

[2] Complaint, Par. 8, R. 241 alleges that "a difference in delivered price of only one cent (1¢) a barrel will deflect the business away from one manufacturer to another".

[3] Par. 9 (a) of the findings, R. 16023, is that "a difference in price as small as one cent per barrel may divert business from one seller to another".

[4] App. I, 30-31, 204-212.

[5] See Par. 9 (e) of the findings, R. 16028-29, quoted *supra*, pp. 47-48.

3. There is no proof or finding of any agreement or even exchange of information as to base or f.o.b. mill prices.

4. Information as to prices of competitors is obtained by respondents from their respective customers and salesmen and it is obtained in this way, as the Commission found, "almost immediately".[6]

5. There is no agreement either through the Institute or otherwise as to whether a respondent shall operate as a base or non-base mill. On the contrary the Commission found that "The number and identity of base and non-base mills change from time to time. A base mill may, for reasons its management considers sufficient, become a non-base mill, and, similarly, a non-base mill may become a base mill."[7]

6. Cement dealers and other buyers are unanimous in their desire to buy on the basis of cost at the point of destination.[8]

7. There is no finding of an agreement among respondents to refuse to sell at an f.o.b. mill price or of an agreement to sell only at delivered prices.[9]

Against this background let us examine the Commission's thesis of conspiracy.[10] It starts with the first sentence of Fdg. 7 (a) (R. 15988):

> "Substantially all sales of cement by the corporate respondents are made on the basis of a de-

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[6] Fdg. 9 (e), R. 16028-29.

[7] Fdg. 7 (b), R. 15989.

[8] See argument at pp. 85 to 86 above.

[9] See argument at pp. 112 to 119 below.

[10] Statement of Points Nos. 16, 17 and 19, R. 16246-54, 16258-60.

> livered price; that is, at a price determined by the location at which actual delivery of the cement is made to the purchaser."

This finding is accepted. See point 6 listed above. The reason cement is sold at delivered prices is because buyers want to buy that way. The thesis continues in the next two sentences:

> "In determining the delivered price which will be charged for cement at any given location, respondents use a multiple basing-point system. The formula used to make this system operative is that the delivered price at any location shall be the lowest combination of base price plus all-rail freight."[11]

The term "respondents" is indefinite but plainly it does not include all respondents because elsewhere the Commission finds that in Southern California there is "an elaborate system of zone prices applicable in certain areas".[12] There is here also an important failure to find with respect to the important markets and areas in which delivered prices are quoted without any reference to this method. A glance at the chart in Appendix A, Vol. I, page 562, will show the large areas where this has occurred.[13]

The Commission then solemnly finds that "this formula, once put into operation, is self-perpetuating"! (Fdg. 7 (h) (R. 15991)

If proof of nationwide conspiracy is sought in the "formula" because it is so extraordinary or unique or arbitrary

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[11] The remainder of 7 (a) gives a hypothetical illustration of how this "formula" works. The illustration is worked out in greater detail in subparagraph (g) R. 15991.

[12] Fdg. 7 (m). R. 16000.

[13] The testimony is digested in App. I, 557-599.

or something that the very fact of its existence is proof enough of conspiracy because nothing like that could exist without conspiracy, then let us look at it. The "formula" is simple indeed. It is no more than the addition of freight to some figure at the mill and the quotation of the total to the customer at his destination. It is just that 2 + 2 = 4 and that 4 — 2 leaves 2. The destination is where the customer wants to know the price. There is no claim or finding that there is anything illegal about that when one mill does it. Does the Commission know of any other way a mill or a group of competing mills might quote delivered prices made up by adding freight to a figure (made up of cost plus profit or cost less a loss)[14] at the mill? Is anything illegal introduced when the mill sells at a number of different destinations and thus adds different figures for transportation cost to the first 2? Is anything illegal introduced when it turns out that anyone who knows how to subtract and knows the published rail freight rates can quickly learn that by subtracting the different freight figures he will always come out with 2 and that that must be the constant figure at the mill? This, then, is the "formula". There is certainly nothing obscure or difficult or mysterious about it.

There are, of course, many sellers and it often turns out that when several sellers are engaged in the same simple process of adding freight to some mill figure to quote a delivered price they each come out with different answers because freight rates are different from their mills or their mill figures are different or both are different. How do they know that their results are different? They know this from their salesmen and customers at the market place

[14] See p. 92, footnote 1, *supra*.

and, as the Commission has found, they know this "almost immediately."[15] Then what? Obviously the seller whose arithmetic produced the lowest figure will sell cement and the others will not. All sellers know this. And what is more important all buyers know this, too. What do the sellers with the higher figures do? They cannot change the freight rate figures but they can change their mill figures and thus get their totals down to the lowest figure, and that is what they do. What they do is called "freight absorption" and it produces "varying mill nets" and to the Commission there is something illegal about both. In fact, the whole method is called by bad names. It is called a "multiple basing point system" made effective by use of a "formula".

This, then, is the "system" and if there is any complication in it, it is only that there are 155 mills and 19 packing plants in different parts of the country, each of which is actively struggling to sell cement in market places within a few hundred miles of the mill or packing plant. If you add the simple to the simple enough times it may eventually seem to be complicated but that does not mean that the employment of a simple and straightforward method of quoting delivered prices is evidence of a conspiracy to do so.

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[15] Fdg. 9 (e). "Through common customers and through salesmen in the field, information concerning this change [referring to any change in delivered price] reaches the other respondents selling cement in that area almost immediately." R. 16029. Evidence as to the broadcasting of delivered price quotations, as to picking up prices in the field by salesmen and dealers and as to the price books, price cards or price lists kept by most respondents showing current delivered prices at each destination where the mill solicits business as well as the limited exchange of price information directly between some respondents is digested in App. I, 213-252.

In conclusion we refer to the evidence of men engaged in the sale of cement as to how price bases are used in quoting delivered prices,[16] how cement prices at the market places become known,[17] analysis of such prices,[18] the effect of quoting lower prices, price reductions and price cuts[19] and the necessity of meeting competition.[20] This and other evidence digested in Part II of App. A Vol. I shows that the Commission's thesis of conspiracy to employ this one "formula" springs from imagination and not from facts.

We contend that the methods of delivered price quotation described above and which have developed with the growth and expansion of this industry do not support any inference of illegal conspiracy. They support the opposite inference. If cement mills generally defied the wishes of the buyers and offered to sell at their mill doors only at a constant f.o.b. mill price and thus were able to sell only to buyers in their freight advantage territory and never sought to compete with others in *their* freight advantage territory, then there might be evidence of some agreement to suppress the normal competitive impulse to seek broader markets and enter the contest in those markets. If cement mills are barred from freight absorption—and that is what the Commission is seeking to do—then there will be restraint of competition, not otherwise. A fence of rail freight rates or other transportation cost will be built around each mill and there will be no means of escape. A series of local monopolies, not competition, will be the result.

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[16] App. I, 409-425.

[17] *Id.*, pp. 220-227.

[18] *Id.*, pp. 456-470.

[19] *Id.*, pp. 252-309.

[20] *Id.*, pp. 309-335.

The lower court, in commenting on this situation, said:

> "It would be interesting to know what the Commission's position would be if Mill A and Mill C had determined to sell only in the territory where each had an advantage freightwise. According to the Commission's theory, this uniformity of action would create an inference that they were acting in concert or by agreement. This inference having been made, we assume the Commission would have no difficulty in finding that A and C were in a combination to restrain competition. The fact is that the restraint which the Commission professes to discern, effected by freight absorption, is insignificant as compared with that which would result if each sold only in its own backyard, as the Commission would have them do" (R. 16791-92).

Further:

> "Continuing with this hypothetical situation, how can there be the slightest inference that Mills A and C had an agreement to use the method depicted? How could Mill A, if it desired to do so, prevent Mill C from coming over and selling in the territory in which the former had a freightwise advantage? And conversely, how could Mill C prevent Mill A from doing likewise in the territory where C had a similar advantage? Moreover, how could either Mill A or Mill C prevent the other from absorbing freight in order to meet the price of the other? And how could either prevent the other from reducing its mill net in so doing?
>
> Neither does the fact that Mill B in the exercise of its own judgment saw fit to establish a non-base mill at Town D create the slightest inference of an agreement or concerted action. It must be remembered that according to the Commission's finding it

was discretionary with Mills A, B and C as to whether they should be base or non-base mills. As the finding states, each may do so 'for reasons its management considers sufficient.' (Finding 7 (b).) What could possibly be the motive for an agreement between these three mills that Mill B should sell cement on the base estabished by Mills A and C? Again we ask, how could Mills A and C if they so desired prevent Mill B from establishing itself as a non-base mill, and how could they prevent it, if they so desired, from selling on any base which its management determined? To argue that the selling system used by these three mills is evidence of a conspiracy may find support in the imagination of the fertile mind of some economic expert, but based upon common sense and the realities of the situation it is wholly without merit. If anything, finding 7, which we have labeled the heart of the Commission's case, in connection with the hypothetical illustration, dispels any inference of conspiracy" (R. 16792-93).

The remainder of Par. 7 of the finding deals with base and non-base mills (7 (b) R. 15988),[21] how non-base mills quote prices (7 (c) R. 15989), groups of mills that have common basing points and the few instances of basing points where no cement is produced (7 (d) R. 15989), so-called dual bases (7 (e) R. 15989), quotations or scraps of testimony which are said to be descriptions of the "multiple basing-point system" (7 (f) R. 15989-91)[22] a recital of old Department of Justice evidence dating from 1900 to 1915

[21] The argument as to this is at pp. 89 to 102, *supra*.

[22] See App. I, 409 to 425 for a digest of all the evidence on this subject. Contrast the comprehensive statement dated December 17, 1928 by the President of Penn-Dixie to the members of that company, pp. 412 to 416 with the two lines quoted in the findings from the answer of that company's vice president to one question.

(7 (h) through (l) R. 15991-99),[23] a reference to pricing methods on the Pacific Coast (7 (m) (n) R. 16000),[24] the organization and activities of the Institute (7 (o) (q) R. 16000, 16003),[25] and N. R. A. Code evidence (7 (p) (r) R. 16001, 16004).[26]

We discuss here only subparagraphs (c) (d) and (e).

These subparagraphs conceal with easy generalities the significant and uncontradicted facts in this record. If these important facts were found there would be an end to the Commission's thesis.

In subparagraph (e) the Commission attempts to state in one easy generality that all non-base mills sell cement at delivered prices determined by the lowest combination of base price plus freight from base mills. The importance of this finding is that it is separate and apart from the statement of the "formula" in subparagraph (a) and the statement of the "formula" does not mention the pricing methods of non-base mills. The lower court correctly construed the findings and held that the Commission's position was that the "formula" was complete and operative without reference to non-base mills.[27]

The generality in subparagraph (c) ignores the fact that the focal point in all price quotation is the market price at destination and that current prices there are known to non-base mills as well and as quickly as they are to base mills. The evidence already referred to, pages 101-102, *supra*, is equally applicable to them and, in addition, responsible ex-

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[23] The argument as to this is at pp. 26 to 30, *supra*.

[24] See the argument for respondents in Cases Nos. 26, 28, 29, 30, 32.

[25] The argument as to this is at pp. 42 to 83, *supra*.

[26] The argument as to this is at pp. 31 to 41, *supra*.

[27] R. 16787, 16788, 16792, 16798.

ecutives of non-base mills have told under oath what they do when they quote delivered prices.[28] These men look to the market place always, and it is a matter of little importance to them as to how the prices that they find there are made up or where they came from. The important fact is the market price which their salesmen must meet or lose a sale. The easy generality given by the Commission does not come from their testimony.

The generality in subparagraph (d) that there are a limited number of basing points at places where no cement is produced, conceals the uncontradicted fact that these were independently established by individual respondents at a few ports of entry of foreign cement along the South Atlantic Coast and were an effort to quote delivered prices that would be competitive with the prices for foreign cement at and moving inland from those port .[29]

Subparagraph (e) deals with a few instances where base mills have reflected two price bases simultaneously, each being used for a different sales area. This subparagraph states that "respondents have maintained" these so-called dual bases. There is inuendo but no evidence and no finding that this was done by agreement. The evidence digested in Appendix A Vol. I, pages 549 to 556 shows just what the competitive conditions were that brought about these dual bases, by what respondent each was established and when and why it was done. In short it shows that dual bases have resulted from the fact that lower prices were quoted to meet competition in a particular area and, as an executive of Lehigh put it, "we saw no particular reason to extend the extremely low prices beyond the areas in which the most ex-

[28] App. I, 445-456.

[29] *Id.*, pp. 576 to 581.

treme competition existed."[30] This uncontradicted evidence answers the innuendo. The differential between the Lehigh Valley and Hudson bases has not always been constant as implied in this finding which is recited on page 18 of the Commission's brief.[31]

5. *Denials of Agreement.*

How well and faithfully have the responsible executives in this industry met the charge made against them in this proceeding? They came forward and spread upon the record not simply denials of agreement, but evidence showing and explaining the methods they employ in the marketing of cement and their relations with their competitors and their customers.

In Appendix A Vol. IV, pages 2912-2914 are sworn denials of agreement by responsible executives of respondent companies. The list of names speaks for itself. It is not a list of salesmen or minor officials. There are 52 names on the list. Sixteen are presidents, 23 are vice presidents, 10 are sales managers and 3 are other officials and all told they spoke under oath for 50 out of 62 respondent companies east of the Pacific Coast. These were the men who, as Mr. Justice Stone put it in the *Interstate Circuit* case "knew or were in a position to know, whether in fact an agreement had been reached among them for concerted action."[1] And these were the men who, as Judge Hand put it in the recent

[30] App. I, 553.

[31] *Id.*, 556.

[1] 306 U. S. 208 at p. 225. In *Interstate Circuit Inc. et al.* v. *United States*, 306 U. S. 208 (1939), Mr. Justice Stone made much of a letter from which an inference of agreement was drawn and from the circumstances of the case showed how strong this inference was

Aluminum case,[2] "were either speaking the truth, or perjuring themselves, not only upon this issue but elsewhere throughout this amazing record."[3]

6. *The Claimed "Resistance" to f.o.b. Mill Selling.*[1]

As already noted *supra*, pages 85 to 86 and as the Commission found, cement is sold largely "on the basis of a delivered price" (Fdg. 7 (a) R. 15988). This does not mean, however, that all cement is sold at delivered prices. It simply means that in any sale, whether it be f.o.b. mill or f.o.b. destination, the buyer and the seller take into

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and how, when it stood unexplained by responsible officers of the defendants, it must prevail. As to this, he said:

> "This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have the authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse * * *. Silence then becomes evidence of the most convincing character."—at pp. 225-226.

[2] *United States* v. *Aluminum Company of America*, 148 F. (2d) 416 (C. C. A. 2nd, 1945).

[3] *Id.*, p. 434.

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[1] Statement of Points, Nos. 17 (aa) through (cc); R. 16253-54.

account the cost of delivery. The uncontradicted evidence shows that sales are ordinarily made at delivered prices because substantially all buyers want to buy at delivered prices. The Commission conceded this to be the fact[2] and Judge Major, in his opinion in the Court below, so noted (R. 16786-87).

On the basis of the evidence[3] the Commission could not have correctly found a refusal on the part of the respondents to sell f.o.b. mill and there is no such finding. As the Court of Appeals said: "All cement, however, was not sold on a delivered price basis. Some was sold on an f.o.b. plant basis and the Commission made no finding of a refusal on the part of the respondents to sell on the latter basis" (R. 16766). At a later point the court noted that "many" respondents had sold on an f.o.b. mill basis and alluded to the decision of this Court in *Maple Flooring Manufacturers Assn.* v. *United States* (268 U. S. 563 (1925)) where that fact was found to be of significance (R. 16812).

The finding as to f.o.b. mill selling is as follows (Par. 7 (r) (R. 16004):

> "The determination of respondents to maintain the multiple basing-point delivered-price system in the sale of cement and *the degree of their resistance to selling f.o.b. mill* are illustrated by certain occurrences with respect to the NRA Code for the Cement Industry." (Italics ours.)

This finding of "resistance" if such it be, loses all significance in the light of the fact that buyers do not want to

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[2] App. I, 177-181.

[3] The evidence is collected in App. I, 170-176; App. II, 722-752, 929-956; App. III, 1450-1484.

buy that way. What is there to resist? Delivered prices are not imposed on buyers. They are quoted in response to the demand of buyers.[4] There is certainly no finding of agreement or conspiracy in this. There is not even an inference of conspiracy.

The evidence on the subject of f.o.b. mill sales does not even show "resistance" as found by the Commission, as a brief reference to the occasional requests by commercial buyers and federal and state agencies for f.o.b. mill prices, will show.

First, as to commercial buyers. The uncontradicted testimony of executives of many companies is that they had no policy against f.o.b. mill selling and had made such sales when requested.[5] Sales to railroads have been customarily made f.o.b. mill where the railroad has a line at the mill and otherwise f.o.b. the nearest junction point.[6] Sales at mills, packing plants or silos, and warehouses to buyers' trucks at prices f.o.b. those points have also been made and still are made in many important markets in response to such demand as there is for it. See the argument pp. 160, 170-172, 180 below.

Second, as to agencies of state and federal governments. Is there "resistance" here? The Commission has conceded that public purchasing agencies generally request that they be quoted delivered prices.[7] It put in evidence

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[4] App. I, 130-134, 176-181.

[5] *Id.*, pp. 170-172. Also App. II, 952-956.

[6] *Id.*, pp. 172-174.

[7] Answer of the Commission in Opposition to Respondents' Motion For Leave to Adduce Additional Evidence, R. 16668. It is there stated, "the evidence offered by counsel for the Commission in support of the complaint already showed this was true and counsel for the Commission never disputed it and do not dispute it now."

185 invitations of eleven states between March 5, 1929 and October 14, 1938 for a total of 76,794,468 barrels of cement. In response to these invitations a total of 1,084 bids were submitted.[8] Only one state, Illinois, on one occasion invited bids f.o.b. mill. This was in 1933 under a new form of alternate proposal which called for bids on an f.o.b. destination basis at 102 county seats and also f.o.b. bidder's mill. Fifteen respondents bid f.o.b. destination and none bid f.o.b. mill.[9] All bids were rejected and finally a contract was negotiated with Marquette.[10] Under the f.o.b. mill alternate bid the successful bidder was required to prepay the freight charges to destination and such charges were to be included on the invoice covering each shipment. The sales manager of respondent Alpha testified that this meant "if we quoted a mill price they (the State) would add on the freight from our mill to destination" and that "we would have had to have a different mill price for almost every destination in order to meet the variance in freight rates", so the State, like any other buyer, was looking at the laid down cost at the county seats where the cement was wanted. Alpha did not bid f.o.b. mill.[11] Four other companies in correspondence with Governor Horner of Illinois and on the witness stand gave their reasons for not bidding.[12] Marquette was unwilling to quote a single f.o.b. mill price because that price to which freight to destina-

[8] The evidence as to sealed bids to states is digested in App. II, 701-752 and see Chart IV A, p. 702 showing the types of invitations and the compliance by bidders.

[9] App. II, 734-741.

[10] App. II, 739-741.

[11] App. II, 735-736.

[12] Marquette, App. II, 736-737; Lone Star, App. I, 190-193; Kosmos, App. II, 738-739; Medusa, App. I, 193-196.

tions would be added would have to be lower than Marquette was willing to go in competition with mills closer freightwise to the destination.[13]

There is no evidence of any agreement among these fifteen respondents on this subject. The most that can be said is that each company for its own good reasons decided not to meet this novel request of the State of Illinois, a request that has never been made again. This may be individual "resistance" in an unusual situation but it hardly supports a broad finding to encompass all respondents in the usual course of business, and certainly shows no illegality.

As to invitations of agencies of the federal government and bids in response thereto, the Commission put in evidence 134 invitations by numerous federal agencies between April 10, 1925 and September 26, 1938 for a total of 25,010,519 barrels of cement. A total of 1,126 bids were submitted in response to these invitations.[14] A variety of types of invitations were issued by federal agencies and 48 invited f.o.b. mill bids.[15] The reason for using this type of invitation was to enable the United States to take title to the cement at the mill in order to be able to ship on government bill of lading and secure the benefit of lower federal land grant freight rates.[16] With this type of invitation, as with all other types, the award is made on the basis of the

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[13] App. II, 736-737, Marquette.

[14] The evidence as to sealed bids to the United States Government is digested in App. II, 873-995 and see Chart IV C, p. 874 showing the types of invitations and the compliance of bidders.

[15] See App. II, 929-932, 940-952.

[16] Evidence as to federal land grant freight rates is digested in App. II, 752-816. See the map of land grant and bond aided railroads, *id.*, p. 758.

lowest laid down cost at destination.[17] The only difference is that the laid down cost to the government is lower where land grant freight rates are available because these rates are lower than commercial freight rates.

The only point of dispute between the Commission and respondents is the argument in Par. 8 (k) of the findings (R. 16015) that the use of a so-called control clause by some bidders deprived the government of the full benefit of land grant rates. The record shows compliance by respondents with this type of invitation and that in all cases the United States obtained the full benefit of the lower land grant freight rates.[18] The evidence is uncontradicted as to who first devised the control clause, what it was, the extent of its use by bidders and its effect on land grant benefits.[19]

This clause was first devised by S. W. Storey, President of Consolidated and Vice President of Florida, Trinity and Signal Mountain and men in his organization early in 1934 and was filed with the N. R. A. Code Authority, as required under the N. R. A. Code, in response to an invitation of the Tennessee Valley Authority.[20] The bid[21] was a destination cost, the minimum cost to the government at the destination specified, made up of an f.o.b. mill figure plus the lowest freight rate available to the government from that mill and the control clause provided that for the purpose of arriving at an f.o.b. mill figure to enable the government to take title at the mill and ship

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[17] App. II, 918-925.

[18] *Id.*, pp. 792-816, 856-868.

[19] *Id.*, pp. 817-868.

[20] For the testimony of S. W. Storey, see App. II, 821-829. See also Com. Ex. 399JJ.

[21] Evidence in explanation of the control clause is digested in App. II, 817-821.

on government bill of lading, the government should deduct from the destination cost bid the lowest freight rate available to the government, whether it be land grant, a special government rate[22] or a commercial rate applicable from the bidder's mill. The bid was in every sense an f.o.b. mill bid. The government took title at the mill and shipped on government bill of lading at the lowest freight rate to which it was entitled. The uncontradicted testimony of executives of 19 respondents who used this clause during the N. R. A. Code period is that they first learned of it when it was filed with the N. R. A. Code Authority in the T. V. A. filing of Signal Mountain, referred to above, and all denied that they used it as the result of any agreement or discussion with competitors and the Commission has not found otherwise.[23] After the N. R. A. Code this clause was used occasionally by 12 respondents.[24]

When we turn to the Pacific Coast area we find evidence that government—both state and federal—always secured f.o.b. mill bids in response to all requests for such bids.[25] This evidence is ignored in the findings.

In conclusion we ask again, where in all this is there "resistance" to f.o.b. mill bids such as the Commission points to in the findings (Par. 7 (r) R. 16004)? If there is, what is there about it that is illegal? Where is there in all this a scrap of evidence of nationwide conspiracy either to refuse to sell cement at f.o.b. mill prices or to support the alleged conspiracy upon which this order is based?

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[22] Evidence as to certain special rates available to the government is digested in App. II, 787-788.

[23] App. II, 840-842; see also Com. Ex. 399JJ.

[24] *Id.*, pp. 843-846.

[25] See the briefs filed herein on behalf of respondents in cases nos. 26, 28, 29, 30 and 32.

7. The Findings and Proof as to So-called Involuntary or Punitive Bases.[1]

The findings on this subject are in Par. 10, R. 16029 to 16040. The evidence is digested in App. I, 484-549.

The argument in the findings is that "The multiple basing-point delivered-price system has inherent within itself means for enforcing its observance." The means is said to be the act of one producer in imposing an "involuntary or punitive" base on the mill of another producer, thus fixing the maximum mill net of the latter and making him suffer a far greater loss than is suffered by the mill imposing the base. This, the argument continues, is done when a recalcitrant must be forced into line and compelled "to adhere to the system." "Some of the leaders of the cement industry," it is said "have not hesitated to use this instrument." (Fdg. 10 (a) R. 16030).

The significant fact in all this, as the court below noted (R. 16802), is that there is no finding of agreement of any sort among any respondents on this subject. How could there be? In the practice itself as described by the Commission it is implicit that there is no agreement between oppressors and victims, if such they be. And if this practice is pointed to as proof that all respondents have combined to adhere to the "system", then surely the victims are not parties to such a combination and there is no finding of any combination among the handful of oppressors, to say nothing of all other respondents.

What do the findings amount to? In Par. 10 (b), (c), (d), (e) and (f) (R. 16030-32, 16035) the Commission sets out eleven instances, most of which occurred during the price war of 1931 and 1932, in which it is claimed that

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[1] Statement of Points Nos. 20 (a) through (f), R. 16260-61.

Lehigh on seven, Alpha on three and Lone Star on one of these different occasions imposed involuntary or punitive bases on mills of named competitors in different parts of the country. Throughout these subparagraphs the Commission claims that each of these so-called punitive bases was imposed to punish price cutters and bring them into line.

What does the proof—ignored by the Commission—show? John Bowen, Vice President of Lehigh testified at length on this subject.[2] He explained how his company was confronted with dwindling sales due to secret price concessions during the scramble for what little business there was in the depression year of 1931. He described his company's effort to maintain its long standing policy to publish its prices and sell at those prices and after making a number of price reductions he described what Lehigh did, as follows:

> "A. * * * At that time, still in an effort to arrive at prices which we could make openly and which we could sell at, we began in the spring of 1931 to quote prices which reflected base figures at some of the mills of our competitors from which we had found the greatest number of secret price concessions to emanate. In doing this the base figures were in no case lower than the base figures of our nearest mills, nor were they lower than the base figures reflected by sales of substantial volumes of cement by those companies.
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> By and large our action was governed by two considerations: First, we had competition to meet and we had to meet it. Second, we wanted to make our prices open, to maintain those prices publicly,

[2] App. I, 495-500, 517-518.

and to treat our customers all in the same manner so that we might hold the same reputation for fair open dealings that we had tried to build up." (R. 7923; App. I, 496-497)

Coogan, Vice President of Alpha testified as to what Alpha did in the three instances in which his company was involved and his testimony is to much the same effect.[3] Charles Hogan, President, and Neylan, Assistant General Sales Manager, of Lone Star both testified as to the circumstances surrounding the incident of 1927 in which Lone Star was involved.[4]

All of these, then, are instances in which three companies acted independently in an effort to maintain their policies of quoting prices openly. Confronted by a violent price war marked by secret price cutting, they sought to quote openly on the same level as their competitors were quoting secretly. The sworn testimony of responsible executives of these companies is that they did this by quoting the delivered prices that they found, as best they could, in the field. The Commission argues that the quotation of these prices involved the imposition of "involuntary or punitive" bases at the mill of competitors and that these competitors were the victims of powerful oppressors. What were these three companies supposed to do when confronted with this situation? Were they required to stand idly by, unable to sell at their published quotations, while their business dwindled to nothing in a depression year? Does the Commission insist that their only recourse was to go underground, so to speak, and join in the game of secrecy, of favoring one customer over another? The so-

[3] App. I, 521-525, 534-541.

[4] *Id.* 530-534.

called victims were competing with secret and discriminatory prices. The so-called oppressors were competing with open prices. Was there anything unfair or wrong about what they did? The Commission avoids all these questions and argues that they had but one motive and that was to maintain the "system" by punishing recalcitrants. There was no punishment. There were no victims and most certainly there were no oppressors. If names are to be called, the Commission's victims were more nearly the oppressors and the Commission's oppressors more nearly the victims. All we say is that each in its own and quite different way played its part in the struggle for business that marked the years 1931 and 1932 and that brought the lowest prices in the history of the industry. This is not conspiracy. This is competition in action.

Fdg. 10 (b) (R. 16030) refers to an incident involving the South Dakota State mill.[5] The record shows the practices of the State-owned plant. The plant started operating in 1925 and its Sales Manager had no previous experience in the cement business (R. 4474, 12668). It is a price base mill. At no time was its price base lower than that of the surrounding price base mills (R. 4479). It meets the lowest quoted delivered price and does not try to beat it as prices are not too high and the plant needs the revenue (R. 12671, 12674, 12699). It has opposed diversions and its bills of

[5] In this finding there are long quotations from two letters which, it is said, show that "the State mill had not fully conformed to its competitors' views of what constituted proper practices in the sale of cement." The letters are said to be between "representatives of Monolith Midwest." The fact is that both were written by a salesman in Denver to Vance, Vice President in Los Angeles. Vance testified as a witness for the Commission that the letters did not represent the facts as he, Vance, knew them and that his company took no notice of them, App. I, 515-521.

lading carry the "non-diversion" stamp (R. 12691-93). It compiles its own rate books and uses the Institute's books for reference (R. 12678-79). It does not favor trucking and for many years prior to and after July 1937, it imposed a 25¢ differential on trucking (R. 12696-98). Its terms and conditions of sale are similar to those of its competitors in the area in which it operates (R. 12688-89, 12690, Resp. Exs. 3365-3367).

Fdg. 10 (g) (R. 16037) sets out a proposal by Institute members in Districts 5, 7 and 8, for inclusion in the proposed N. R. A. Code, condemning as unfair competition the establishment of a maximum (base) price by a manufacturer at the mill of a competitor. It is then said that this proposal was never submitted by the Institute to N. R. A.[6]

In Fdg. 10 (h) (R. 16038) the Commission scolds the industry and the Institute for not including in the Compendium of December, 1935 a provision condemning "punitive bases," and finds in this omission evidence of "The necessity for retaining the compelling force, both actual and potential, of punitive bases in restoring and maintaining uniform prices determined according to the multiple basing-point delivered-price formula." Usually this industry and the Institute are scolded for putting something in the Compendium. Now they are scolded for leaving something out. In either case and whatever it relates to, the Commission is able to discover "proof" of agreement. Here failure to condemn is apparently pointed to as proof of agreement to maintain. If that is not the purpose of the recital then what is the purpose? In any event, sophistry

[6] We contend that this N. R. A. evidence has no place in this record. See pp. 31-41, *supra*.

is not evidence and there is no evidence of agreement of any sort.[7]

The Commission ends finding 10 (h) (R. 16038-40) with extensive quotations from a long letter of December 6, 1935 from the President of Kosmos to Rader, Vice President of Lehigh. Rader submitted that letter to his superior, Young, President of Lehigh, and the Commission then quotes piecemeal extracts from Young's comments on it to Rader in which he suggested that the proponent of the plan should submit it to his counsel for an opinion.[8] The Commission conceals the fact that Young rejected the whole notion because "my own impression is that any such joint action would be construed as a conspiracy to fix prices in restraint of trade and would therefore be in violation of the anti-trust laws".[9] Nothing ever came of this brainchild. The idea and the letters never went beyond Lehigh.

E. The Findings and Proof as to the Uniformity of Delivered Prices Shown in this Record.[1]

This is not a price-fixing case. The Commission has conceded that it makes no charge that respondents have agreed on any of the many bids to public agencies that are in evidence.[2] There is no finding that respondents have agreed to make their regular commercial prices uniform.

What do the findings show?

In Par. 9 (a) the Commission finds that "a difference in price as small as one cent per barrel may divert busi-

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[7] App. I, 541-542.

[8] For the full text of both letters see App. I, 542-549.

[9] App I, 548.

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[1] See Statement of Points No. 19, R. 16258-60 for errors assigned on the subject of uniformity of price.

[2] R. 7148, 7971-72.

ness from one seller to another" (R. 16023). We accept this finding. This finding supports the allegation of the complaint that "a difference in delivered price of only one cent (1¢) a barrel will deflect the business away from one manufacturer to another".[3] We accept this allegation.

In Par. 9 (a) the Commission also finds that with some exceptions "in general it is true that the commercial delivered prices of all respondents making sales of cement at any given destination have been identical."[4] This finding is accepted in so far as it relates to published or openly quoted cement prices.[5]

The findings then recite instances of identity of prices on bids to public agencies.[6] Respondents do not raise any issue as to the substantial uniformity of prices on a substantial number of the 2,210 bids.[7] The 10 examples of almost absolute identity set out in the findings, however, do not reflect the situation shown by the whole evidence.

No inference of conspiracy is predicated upon identity of cement prices in the findings, though counsel for the Commission in its brief, pages 49-61, argues that if all other proof were lacking the proof of uniformity of prices on sealed bids to public agencies is enough to support findings of a combination (p. 51). It is not the function of counsel for the Commission to draw inferences from the proof or to ask this Court to draw such inferences. This is emphasized by the findings themselves in which the Commission expressly negatives the existence of such an in-

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[3] Complaint, Par. Eight, R. 241.

[4] R. 16023.

[5] The evidence as to the extent of uniformity of cement prices is digested at App. I, 203, 252-309. As to secret price cuts, see p. 130 *infra*.

[6] Fdg. 9 (b) (c) R. 16023-28.

[7] See App. II, 703-704, 875-887.

ference in Par. 9 (e).[8] There is no finding that respondents have agreed to make their prices uniform. There is no finding that respondents have agreed not to quote lower prices. The only finding as to the significance of uniformity is the recitation in Par. 24 (d)[9] of the findings that respondents have used the multiple basing-point system "for the purpose and with the effect of producing identical delivered prices." That statement, as we shall show below, is not supported by any evidence. More than that it belies the uncontradicted facts viewed in the light of the existing law.

We contend that the substantial uniformity of price that exists at any given time and place in the markets where cement is bought and sold is brought about by the following basic factors shown by uncontradicted evidence in this record—evidence ignored by the Commission.

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[8] In Fdg. 9 (e), it is stated: "Except to the extent that the dissemination of delivered prices during the NRA Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices. No such exchange is needed in the successful operation of the multiple basing-point delivered-price system. When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately. Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made. Notices of price increases are usually sent to customers five days in advance of the effective date thereof; and in the case of a decrease, customers are usually given the benefit of the decrease on shipments made during the five days preceding the decrease." R. 16028-29.

[9] R. 16129.

1. Cement is homogeneous in the eyes of all buyers and no buyer will pay one cent per barrel more for one brand than for another. As the lower court put it, "it is an interchangeable product" and "cement is cement".[10] The Commission so alleged in its complaint and has so found.[11] We know of no other anti-trust case in which this fact has been conceded by the government.

2. There are buyers of cement in every city, village, town and hamlet throughout the country. All these buyers (including dealers, contractors and governmental officials) are professional buyers who are well-informed on differences in quality between different brands of cement. On this point the Commission made a finding which the lower court set aside as being without support in the record and as being contrary to the only evidence on the subject.[12] The finding is that "in general, dealers and ordinary purchasers are not aware of differences in quality among the brands of cement" and that if they did have this knowledge this would "tend toward making it impossible for respondents to maintain uniform prices."[13] There is no evidence in support of this finding. The only evidence is to the contrary.[14] The lower court characterized the Commission's argument as bordering on the absurd.[15]

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[10] R. 16765.

[11] Complaint, Par. 8, R. 241; Fdgs. 9 (a) R. 16023; see also App. I, 204-212.

[12] R. 16805-16806.

[13] Par. 20 (h), R. 16108.

[14] R. 11127-28, 11138-39, 11143-44,

[15] R. 16805.

3. These professional buyers of cement are also well-informed on market conditions and prices. They are constantly aware of prices quoted by sellers.[16]

4. Each manufacturer, likewise, keeps constantly and immediately informed by its salesmen and customers of the prices being quoted by its competitors at all points where it sells or solicits business.[17] The Commission so found.[18]

5. The effect of quoting higher prices: no seller can sell at a price higher than another seller's price because no buyer will pay a penny more for one brand than for another (point 1, above). Accordingly the seller who quotes a price higher than the prevailing market price will not sell any cement. It is only if all other sellers in the market follow his lead that he may sell cement. If even one other seller does not follow his lead, that one seller will sell cement and the others will not. The record shows many such unsuccessful attempts to increase the market price.[19]

If a seller is unable to lower his price to at least meet the prevailing market prices quoted by his competitors at destination because those market prices are too low, then he must abandon the market. The record is full of uncontradicted evidence showing such abandonment.[20] The abandonment of any market is a serious matter to a cement company for once abandoned it is very difficult and often im-

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[16] See App. I, 213-227.

[17] See *id.*, pp. 213-252, 269-271.

[18] Fdgs. 9 (e), R. 16028-29.

[19] The Trial Examiner ruled that there was "abundant testimony from various respondents on the subject." R. 9615. See also R. 3370-71, 8508-09, 8845, 8849-50, 8855-56, 9477, 9614-15, 10121, 11357-58, 11769, 12228, 12396, 10719-20, 7934, 6929, 11886-87, 11615, 3199-3200, 3204, 3206-07.

[20] App. I, 292-309. The evidence shows the abandonment of marketing areas by 29 companies for this reason.

possible to regain the market. This evidence, too, is uncontradicted.[21]

6. The effect of quoting lower prices:

a) secret price cuts: the Commission found that the respondents made "numerous concessions" and the record is full of uncontradicted evidence showing a large amount of secret price cutting in a variety of forms by cement sellers.[22] A secret price cut may get an order for cement but it does not long remain secret and buyers give their usual sources of supply an opportunity to meet such secret price cuts. This was conceded and further proof curtailed.[23] Continuous or extensive secret price cuts and concessions have in the past led to drastic price wars with prices reduced to and below the level of out-of-pocket costs of production. This was true in 1931 and 1932 in most areas and in some areas carried into 1933.[24] A desire not to precipitate another disastrous price war is a natural deterrent to such a practice.

b) open price reductions: open price reductions made in the usual manner by open price quotations are shown throughout this record.[25] Competitors must meet these reductions or abandon the market.[26]

All of the factors which are enumerated above and which are shown in this record were present in the record before this Court in the first *Cement* case. Mr. Justice Stone said:

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[21] App. I, 305-309.

[22] Fdg. 6 (c), R. 15987. Evidence in support of this finding is abundant, App. I, 252-285.

[23] App. I, 269-271.

[24] *Id.*, pp. 254-265, 603-604.

[25] *Id.*, pp. 252-254.

[26] *Id.*, pp. 204-212, 285-309.

"* * * the fact is that any change in quotation of price to dealers, promply becomes well-known in the trade through reports of salesmen, agents and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers.

It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition; and the Government in its brief concedes that 'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers.' "[27]

When we turn to the testimony of the economic experts in this record we find that it fully supports the position of respondents.

There are certain lines of commodities in which, by standardization or otherwise, the buyers know that the product of any producer is equally satisfactory. This is true of ce-

[27] 268 U. S. 588 at 605-6.

ment. No buyer will pay one cent more per barrel for a particular brand, as the complaint itself in this case alleges.

Openly quoted prices for such commodities, frequently referred to as "homogeneous"[28] are bound to be uniform except at a time of price change. Secret price cuts are, of course, another exception to this rule.

Since the time of the classical economists, this economic law has been repeatedly stated in substantially this form:—that under competitive conditions, the price of a homegeneous product in a market at any one time will be a uniform price; that there cannot be two prices at the same time and place for the same commodity. To this general principle, economists called by the Commission fully subscribed, except that they preferred to state it as "a tendency toward uniform price."[29]

Is this economic law of uniform price applicable to delivered prices? The respondents' economists said that it was. Their reasons were—that when delivered prices became prevalent, the market shifted from the mill to the delivery point; that at that point the same factors that had been found to be the cause of uniform prices in general were equally applicable to delivered prices,—a homogeneous product and well-informed buyers.[30] The logic of this is irresistible. Why should a dealer or contractor, solicited by

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[28] A product is considered "homogeneous" if the buyer regards its different units as satisfying equally the buyer's needs and desires, so that he has no reason to pay more for one unit as compared with another (App. IV, 3012-13).

[29] The uncontradicted evidence is that the word "tendency" is a technical word in economics signifying a force that will produce a certain result unless other forces intervene. For example, gravity will tend to cause an object to fall, unless some other force exerts a greater and contrary influence. App. IV, 3014.

[30] App. IV, 3016-17.

salesmen from two cement mills, each offering cement equally satisfactory to the buyer, pay more for one than for the other? The result is inevitably a high degree of uniformity of delivered prices.

This is the very simple and yet, we submit, completely convincing explanation of uniform prices, as set forth in the great mass of testimony, both of men engaged in the business and of economic experts, most of which stands uncontroverted in the record.

The Commission has made findings based on the testimony of its economic experts. This is the testimony that left the lower court, as it said, "in a badly confused state of mind" and these are the findings that are "almost as confusing."[31] Our argument addressed to these findings is at pages 146 to 150 below.

The only way in which employment of a basing point method by any respondent would produce the identity of price that the Comission claims to be the inevitable result of the employment of this method would be if there were agreement as to the factors that enter into this method, to wit: agreement as to the mills that are basing points and agreement as to the price base at those mills. The Commission finds no such agreement. In fact it finds (Fdg. 7 (b) (R. 15988)) that each mill is free to establish a base or price base at that mill or not to do so as its management sees fit and there is not even a claim of agreement as to bases or price bases.

All that has been set forth above applies with equal force when the government is a buyer. In addition there are special factors that apply.

The Commission introduced in evidence a total of 319 invitations issued by State and Federal agencies between 1925

[31] R. 16803.

and 1938 for a grand total of 101,804,987 barrels of cement and 2210 bids of different respondents in response thereto.[32] We raise no issue as to the substantial uniformity of the bids submitted in response to a substantial number of these invitations.

The Commission has conceded that it makes no charge that respondents agreed on the bids they would make.[33] The record is clear on this point. Executives of respondents denied agreement and in addition, confronted with 2210 bids in evidence, testified, until further proof was cut off by the Trial Examiner, as to how the prices they bid had been determined.[34]

Sealed bids to governmental agencies fall into two categories:

1. Those in which federal land grant freight rates are not involved.

In this category are all bids to states and a large number of bids to federal agencies. In all these cases respondents customarily bid the prevailing dealer price at the destination where the cement is wanted though there are many instances in the record in which lower prices have been quoted.[35] All factors mentioned above apply here to produce the same degree of uniformity that exists with respect to any other buyer. In addition, almost invariably when a sealed bid lower than the prevailing price has been opened, this, like any other open price reduction forces a

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[32] See Chart IV-A, App. II, 702 for State invitations and bids and Chart IV-C, App. II, 874 for Federal invitations and bids.

[33] R. 7148, 7971-72.

[34] App. II, 704-712 as to State bids and App. II, 875-914 as to Federal bids.

[35] App. II, 870-880.

similar reduction to all other buyers.[36] In addition, in many instances bidders who bid higher than others have been permitted, after the bids were opened, to meet or equalize their bids with the lower bids,[37] while in other instances all bids were thrown out and readvertised for the purpose of encouraging still lower bids and no award was made to the original low bidders.[38]

The foregoing facts are ignored in the argument in the Commission's brief, page 52 that it would be a simple matter for any respondent to make a low bid and secure all the business. We note that the Commission concedes on page 52 that this process of making a low bid could not be repeated indefinitely. If it were so repeated, as it was from 1931 to 1933, it would produce a price war, as it did in those years.[39]

The foregoing facts also answer the assertion in the Commission's brief page 53 that if low bids were made by even one respondent "the system would * * * have collapsed like a house of cards".

The assumption is made in the Commission's brief page 53 that uniformity of bids is the result of adherence to the Commission's "formula". If that is so, how does the Commission account for uniformity of bids at the many places where the so-called "formula" was not used? The fact is, as already pointed out, that substantial uniformity is the result of meeting prices at the market place regardless of

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[36] App. I, 274, 287-288; App. II, 714-715, 878; App. IV, 2938.

[37] See Missouri bids for 1930, 1931 and 1932; App. II, 716-717; App. IV, 2938-39. Indiana bids for 1931 and 1932; App. II, 717, 742-743; Wisconsin and Louisiana App. II, 718;

[38] See Illinois bids, App. II, 714-715, 729-731; Wisconsin bids, *id.*, p. 715; Indiana bids, *id.*, 743.

[39] App. I, 254-265; 603-606.

how those prices were arrived at.[40] Further, executives of respondents, as already noted, came forward and testified, until further proof was cut off by the Trial Examiner, as to how the prices they bid had been determined.[41]

In addition, it also appears that many bids on important invitations were at prices lower than prevailing commercial prices.[42]

2. Those in which federal land grant rates are involved.

In this category are bids to federal agencies in which a bid is invited f.o.b. so that the United States may take title at the mill in order to be able to ship on government bill of lading and secure the benefit of lower federal land grant freight rates. These rates are available only over certain railroads and in certain areas.[43] These rates are customarily carried out to decimals growing out of the percentage division of rates between land grant mileage and non-land grant mileage on a particular railroad together with the application of the resulting rate to particular poundages.[44] These land grant freight rates are known to sellers through a number of sources: the railroads, tabulations of bids and abstracts of prior lettings and government circulars and other publications.[45] For a period of one year (January, 1936 to

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[40] See our argument as to the variety of pricing methods that exist in important markets, pp. 89 to 91 above. See also Chart II-I, App. I, 562, for the many areas where prices did not reflect any "formula". Sealed bids at points in those areas were nevertheless uniform. See e.g. Com. Ex. 1099 A-D, M, W; also App. II, 704, 707.

[41] App. II, 704-714 as to State bids and App. II, 873-914 as to Federal bids.

[42] App. II, 879-880.

[43] See map of land grant railroad lines, App. II, 758.

[44] See App. II, 789-792.

[45] App. II, 764-776.

January, 1937) the Institute collected land grant rate information from these sources and disseminated it to members (Fdg. 8 (m) (n) R. 16018-19).

The decimals that are involved in bids in which land grant rates are involved are the decimals that are in these rates. They come from no other place. Identity of decimals carried out to any length simply means that the bidders have used the same transportation cost in calculating their bid. The only apparent difference between land grant and regular commercial rates is that land grant rates are often figured out to as many as eight decimals.

The lower court referred to what the Commission described as a typical example of price identity in a bid in which the land grant rate to which the government was entitled from the nearest mill of the eleven bidders was $1.1865854 per barrel and then pointed out that it was "more fanciful than real" to contend that the identical bids "necessarily were the result of collusion" when all that was required was the application "of a simple formula in arithmetic to determine the amount of the bid which would probably be made by the mill most advantageously located." If other mills expected to obtain any part of the award they would have to meet that bid, as the lower court held, and bidders at a freight disadvantage would have to absorb some freight to do so.[46]

The conclusion of the lower court on this subject of uniformity of price was as follows:

> "Under the circumstances shown, we think it is the inevitable result of any pricing system that cement must be sold at the same place at a uniform price whether it be at the point of production or

[46] R. 16806-07.

that of destination. Suppose the Commission's order becomes effective, can it be doubted that the plant price of cement of producers located in the same area will be uniform? If one producer persists in selling for more than the others, his customers will be lost. If he sells for less, the others will be compelled to lower their price to the same level, or forego the business. Further, if they sell at a uniform price it will immediately create, according to the Commission's theory, an inference that they are acting in collusion'' (R. 16808).

All of the foregoing basic facts which we contend produce uniformity of cement prices have been before this Court in one form or another in a number of unchallenged decisions and in each the existence of price uniformity was recognized as the expression not of conspiracy but of competition.

Cement Manufacturers Protective Association v. *United States*, 268 U. S. 588, 605-06 (1925);

Sugar Institute Inc. v. *United States*, 297 U. S. 553, 600 (1936); s.c. 15 F. Supp. 817, 887, S. D. N. Y. (1934);

Maple Flooring Manufacturers Association v. *U. S.*, 268 U. S. 563, 582 (1925);

United States v *International Harvester Co.*, 274 U. S. 693, 708-09 (1927);

United States v. *United States Steel Corporation*, 251 U. S. 417, 447-449 (1920);

See also

United States v. *Standard Oil Company of New Jersey*, 47 F. (2d) 288, 316-17 (E. D., Mo. 1931).

We have already referred to the opinion of Mr. Justice Stone in the first *Cement* case.[47] In the *International Harvester* case this Court said:

> "And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination" (274 U. S. 693, 708-709).

In the *Standard Oil* case the District Court after referring to the fact that the prices of the major oil companies were changed at close to the same time, said:

> "In the main, the prices are the same but there is much selling at lower prices at many localities. The reasons for such uniformity as exists are not far to seek * * * While there is sharp conflict in the evidence as to which company first makes changes in prices, it is evident that Socony could do so, and, if that change were a reduction, its competitors, generally speaking, would be compelled to follow that lead. But, even if it be taken that others, in this area, 'follow' (in the above sense) the Socony prices, that is not governing, because there is no element of compulsion or attempt at compulsion present, although it is, as contended, proof of its business power in this area. The undisputed facts that competitors, large and small, have increasingly come into this area, extended and expanded their businesses freely, and are doing so with increasing force, completely negative any finding of an attempt at compulsory price control or any such result in the sense of the Anti-Trust Act * * *" (p. 316).

The opinion of the District Court also makes clear that no restraint on competition is to be inferred from uniformity of

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[47] *Supra*, pp. 130-131.

prices arising out of price leadership.[48] Thus, at pages 316-317 the Court said:

> "* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competitors in all lines. U. S. v. International Harvester Co., 274 U. S. 693, 708, 709, 47 S. Ct. 748, 71 L. Ed. 1302; Cement Mfgrs.' Assn. v. U. S. 268 U. S. 588, 606, 45 S. Ct. 586, 592, 69 L. Ed. 1104; American Column Co. v. U. S., 257 U. S. 377, 417, 418, 42 S. Ct. 114, 66 L. Ed. 284, 21 A. L. R. 1093; Geddes v. Anaconda Min. Co., 254 U. S. 590, 595, 41 S. Ct. 209, 65 L. Ed. 425; U. S. v. U. S. Steel Corp., 251 U. S. 417, 447, 40 S. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121. Grocers, Butchers, and all other lines in the same markets, generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

The lower court pointed out that "there is no identity of bids as between groups" and correctly held that if any inference of collusion might be drawn from identity of bids, it must be confined to members of the group making the bids and would not give rise to any inference against all

[48] As shown in the evidence there is no single price leader in the cement industry; many of the companies have exercised price leadership from time to time (App. I, 309-312). If anything this difference indicates more rather than less competition.

members of the industry, citing *Kotteakos* v. *United States*, (328 U. S. 750, 1946).[49]

These recent decisions and other decisions of this Court listed above, are particularly applicable here where, as we have already seen, cement is not marketed by any mill on a national scale; the market of each mill is not more than 200 to 300 miles from the mill; a separate and distinct group of respondents is concerned with each of the separate and distinct invitations and bids in evidence; there is no charge that any respondents agreed on the bids they would make in response to any of the 319 invitations that are in evidence; the Commission has found that there was no exchange of price information between the corporate respondents through the Institute or otherwise; the economic forces that produce the uniformity of price that exists at any given time and place in this industry are explained in the simple and basic factors set forth at pages 127 to 130 above and are shown in part by the findings of the Commission and conclusively by undisputed evidence ignored by the Commission in making its findings.

In the Commission's brief, pages 54-56, reference is made *erstate Circuit, Inc.* v. *United States*, 306 U. S. 208, but the facts there showed a written proposal submitted to and acted upon by the defendants. Standing unexplained this Court held that this furnished an adequate basis for an inference of agreement to carry out the proposal. No such facts exist in this record.

The reference on pages 55 to 56 to three decisions[50] of

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[49] R. 16808-09.

[50] *United States Maltsters Ass'n.* v. *Federal Trade Commission*, 152 F. (2d) 161 (C. C. A. 7th, 1945); *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. (2d) 478 (C. C. A. 7th, 1946); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. (2d) 899 (C. C. A. 7th, 1946) cert. den. 329 U. S. 795 (1946).

the same Circuit Court that decided the instant case is curious. Two of the cases were decided shortly before the argument in the instant case and one was argued after and decided before the decision in the instant case. We would suppose that the court below, more than any other court, would be well aware of the important differences in the facts of each of those cases and the facts in the instant case. The differences are striking. It is enough to say, as Judge Major said below, after making one obvious distinction, that "those cases are also distinguishable in numerous other ways not necessary to discuss" (R. 16814).

F. The law as to the Concurrent Use of a Marketing Method: the Argument that "the Multiple Basing Point System" is Illegal *per se*.

We recognize fully the propositions of law recently stated by this Court that "it is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators,"[1] and that "no formal agreement is necessary to constitute an unlawful conspiracy * * *. The essential combination or conspiracy * * * may be found in a course of dealing or other circumstances as well as in an exchange of words."[2]

We have noted above, pages 83-84, the argument made in the court below (R. 16791) and renewed here that the so-called "multiple basing point system" is illegal *per se*.

The Commission makes this argument in the face of the plain statement by this Court in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945) that the Congress, in rejecting the provision of the Robinson-

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[1] *Interstate Circuit* v. *United States*, 306 U. S. 208 at 227 (1939).

[2] *American Tobacco Co.* v. *United States*, 328 U. S. 781 at 809-810 (1946).

Patman Bill which would have defined the word "price" as used in Section 2 of the Clayton Act as meaning the mill net of the seller, "was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal *per se*" (324 U. S. at p. 737).

It is thus not illegal *per se* under the Clayton Act, as amended. If it is not illegal *per se* under that Act, then it is not illegal *per se* under the Federal Trade Commission Act or any other law. In short, notwithstanding repeated urging by the Commission[3] Congress was unwilling to declare it to be illegal *per se*.

If there were proof of agreement, express or implied, in this record, then there would be no need to resort to this

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[3] Thus, e.g., Walter B. Wooden, Associate General Counsel of the Federal Trade Commission in his oral testimony on behalf of the Commission before the Temporary National Economic Committee on January 30, 1940 requested such legislation adding: "As the situation is now with the outcome of any basing point case depending upon the interpretation of the law and the facts under *theories of conspiracy and concerted action which are necessary to make the law applicable*, I think, it requires an enormous expenditure of time and effort and labor * * *" and "I would say that no more vitally needed legislation within the scope of this Committee can be suggested than that of directly prohibiting the basing point system by Congressional mandate." (Verbatim Record of the Proceedings of the T. N. E. C., Vol. XI, No. 12, Jan. 30, 1940, p. 400; italics ours.)

Federal Trade Commissioner Freer testified before the Committee on Interstate Commerce of the United States Senate, when it was considering the so-called "anti-basing point bill" (S. 4055), 74th Congress (1936) that:

> "It is a matter of policy for Congress to determine whether the employment of the basing point systems shall be specifically banned by statute. * * * We believe that S. 4055 is drafted in proper form to attain that end." (Hearings before the Committee on Interstate Commerce, United States Senate, Seventy-Fourth Congress, second session on S.4055, p. 325.)

This bill was defeated in Congress.

argument. If, on the other hand, the Commission is using this argument as a substitute for proof of agreement, then its position has no support in any decision under our anti-trust law. Thus, in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927) there was proof of agreement on prices and the holding of this Court was that that proof alone was enough to make out a violation of the Sherman Act. Any price fixing agreement is illegal *per se*. In *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150 (1940), there was again plain proof of agreement as to the two buying programs.

The court below gave careful consideration to this important question. It noted that "the basing point price system has been in use by industry for almost a half century" and that "there has been and is a marked diversity of opinion among economists, lawmakers and people generally as to whether it is good or bad" (R. 16815). The goodness or badness of this marketing method is not in issue before this Court. The lower court said this:

> "In our judgment, the questions as to whether the basing point price system should be declared illegal rests clearly within the legislative domain. We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." (R. 16815-16)

This case involves the marketing methods and problems in the cement industry. The opinion of this Court in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939)

was addressed to the activities of moving picture distributors in response to a written invitation calling for concerted action on a matter as to which all had a common interest. With the government's evidence standing unexplained, common sense called for the conclusion reached by this Court as to the required proof of conspiracy. In *United States* v. *Masonite Corporation*, 316 U. S. 265 (1942) the situation shown in the record involved direct proof of separate written agreements which taken together revealed a larger arrangement as the plan progressed. In *American Tobacco Co.* v. *United States*, 147 F. (2d) 93 (C. C. A. 6th, 1944), affd. 328 U. S. 781 (1946) the common purpose that knit together the many acts shown in the record grew out of the common interest of the "Big Three" in common problems in common markets in that industry.

In the cement industry, as we have seen, there is no nationwide market in which all have a common interest. In fact, as the Commission found in the classic words of Paragraph 6 (a): "some * * * have been parties to substantially all * * * activities", others "in a lesser degree, or fully or partially", others have been "mere followers" while a few have taken part "only reluctantly" and have "occasionally opposed for a time" (R. 15984). As Judge Major put it at one point in his opinion "they were a queer lot of conspirators" (R. 16777). They were indeed.

The Commission in its brief, page 39, argues that *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), is applicable here because here there is a combination to eliminate price competition effectuated "by agreement or understanding to sell on a delivered price basis" (there is neither proof nor finding to that effect) and "to compute delivered prices in such fashion that at any given point

sellers' prices are identical'' and that this is done pursuant to a formula (there is neither proof nor finding as to any formula such as is stated on page 39 of the Commission's brief). On the basis of these unsupported assumptions the Commission then argues that "this was price fixing in its most virulent * * * form" and that the *Socony-Vacuum* case is applicable. The entire argument has no foundation in the facts in this record. As already pointed out, there was plain proof of agreement as to the two buying programs in the *Socony-Vacuum* case.

G. Nationwide Conspiracy as Charged Is Not Shown in the Findings Based on the Testimony of the Commission's Economic Experts.[1]

In the court below the Commission relied upon Par. 22 of the findings (R. 16122-24) as a finding of the combination charged. This finding deals with the testimony of economic experts. The Circuit Court properly held that the Commission had used this evidence as proof of the combination charged and that this was error (R. 16782-83, 16804-05). The Commission in its brief has apparently accepted the decision of the court below on this point though we note that Fdg. 22 (c) is recited on page 16 of its brief without disclosure of the fact that it is based on the testimony of experts. We challenge this finding below.

The decision of the Circuit Court was clearly correct. Expert testimony is not factual evidence and the Commission's chief economic witnesses, Dr. Viner and Dr. Fetter, expressly denied testifying as factual witnesses.[2]

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[1] Statement of Points Nos. 32 and 34(a), R. 16277-78, 16279. The evidence of the economists is digested in App. IV, 2963-3082.

[2] R. 5244, 5629, App. IV, 2988.

The Commission's expert testimony was admitted over the objection of respondents (R. 5213, 5621-22). The Circuit Court, in commenting on it, said that the Commission's economic testimony "leaves us in a badly confused state of mind", that "the findings predicated thereon are almost as confusing" and that "the statements contained in this finding are so argumentative and inconsistent as to be entitled to little if any weight as a finding of fact" (R. 16803, 16805).

The respondents offered the testimony of several eminent economists in rebuttal of the Commission's expert testimony since it was the only way they could be sure that that testimony would not stand unanswered.[3] The testimony of these economists is digested topically in App. IV, 3005, *et seq.* If this Court should feel that the economic testimony in this record is useful in aiding understanding and appraisal of the facts which were proved, it is important to note that the testimony of the Commission's economists was not based upon hypotheses supported by facts in the record. If we are right about this, their testimony is incompetent for any purpose and Par. 22 of the findings (R. 16123-24) has no support in this record.

The only testimony of its economists to which the Commission can point that even remotely bears upon the ques-

[3] The following economists were called to testify by respondents: Professor Clare E. Griffin, Dean of the Graduate School of Business Administration, University of Michigan; Professor Roland S. Vaile, Professor of Marketing, University of Minnesota; Professor Fred R. Fairchild, Department of Economics, Yale University; Professor Ray B. Westerfeld, Department of Economics, Yale University; and Professor Ewald T. Grether, Department of Economics, University of California. In addition respondents tendered as a witness Professor Ralph P. Cassady, of the Department of Economics of the University of California, and other economists but this tender was rejected by the Commission as cumulative. App. IV, 3005.

tion of conspiracy is the testimony of Dr. Viner and Dr. Fetter. The stage was set for their testimony by purporting to describe in a long hypothetical question the method of marketing in the cement industry. The description departed in many vital respects from the facts as disclosed by the evidence and the subsequent findings of the Commission.[4] The testimony of these economists based upon hypothetical questions for which there was no factual support in the record and which failed to take into account other material facts in the record, is wholly incompetent and worthless.

Raub v. *Carpenter*, 187 U. S. 159 (1902);
Atlantic Life Insurance Co. v. *Vaughan*, 71 F. (2d) 394 (CCA 6th, 1934);
The Domira, 49 F. (2d) 324 (D. C., E. D. N. Y., 1931; aff'd 56 F. (2d) 585 (C. C. A. 2d, 1932).

The respects in which the hypothetical questions went beyond the facts in the record or ignored facts in the record,[5] are as follows:

It was stated that the product was sold by rigid, unvarying adherence to a formula method of pricing (every delivered price being the lowest combination of base price plus freight to destination). There was not stated to be any departure from this,—no special prices, no secret price cutting, no so-called zone prices, no port prices to meet foreign competition, no uniform prices in large metropolitan areas, no silo prices based on water transportation, no sales f.o.b. mill, and no prices based on silos at points dis-

[4] App. IV, 2974, 2986-87.

[5] The questions appear at R. 5199, 5588-89; also see App. IV, 2964-65, 3069-72.

tant from the mill. These are not trivial omissions; as shown below, their inclusion would have completely altered the picture.

Other important facts were omitted,—no statement as to the existence of high varying overhead costs and their effects, or as to the importance of operating at or near capacity, or as to seasonal variation and shifting location of demand, or as to the geographical relation of mills to consuming areas, or as to the number and location of mills in the several geographical areas, or as to the desire of the buyers for delivered prices, or as to the ratio of profit to investment, or as to inelasticity of demand.[6]

Were these omissions important? Would their inclusion have resulted in different testimony? Let the witnesses themselves answer,—

First, Dr. Viner. He testified that if there is secret price cutting, that is competition; he assumed in his answers on direct that large numbers of price cuts did not exist; if they did exist, his answer "would have been different." He "would call that an industry of flexible prices" and would "regard it as competitive practice."[7] If it had been stated that mills sell very frequently on an f.o.b. mill basis and that few mills had consistently refused to sell f.o.b. when asked, that would have changed the

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[6] The correct definition of the term is found in the record (See App. IV, 3019):

> "Elasticity of demand refers to that quality of demand by which the demand increases as the price decreases, and decreases as the price increases * * * When the demand for a product shows this quality in a high degree, we call that elastic."

The question is a basic one. Obviously if a mill could sell its entire output locally at a small reduction in price, it would do so, and avoid sales at distant points that net far less.

[7] R. 5236-37; 5270-71; App. IV, 2984, 3070.

question "very importantly."[8] Making a silo a basing point to make the area less attractive to mills elsewhere "would be an act of price competition," etc.[9]

Next, Dr. Fetter. He admitted that he had given no consideration to these omitted factors. He admitted that if it is true that buyers generally have demanded delivered prices, that might have changed his answers to the long hypothetical question.[10] He conceded that if this question had included the statement that some cement is sold f.o.b. mill to buyers and to the Government, that would substantially change the question and "would materially change the operation of the basing point practice."[11]

These experts were passing judgment upon a marketing method that does not exist; *certainly it was not the marketing method in the cement industry shown in the evidence.*

III. The decision in *Cement Manufacturers Protective Assn. v. United States*, 268 U. S. 588 (1925) controls important issues here.

We rely upon the decision in *Cement Manufacturers Protective Assn.* v. *United States*, 268 U. S. 588 (1925) as follows:

1. As a precedent to show the legality of the organization and activities of the Institute in so far as it engaged in the publication and distribution of freight rate books (argued pp. 59 to 68 above), the dissemination of information relating to specific job contracts (argued pp.

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[8] App. IV, 2984.
[9] *Id.* 2984, 3070.
[10] *Id.* 2987-88.
[11] *Id.*, 2988.

68 to 75 above), and the collection and distribution of statistical data (argued pp. 201 to 207 below).

2. As *res judicata* of the charges brought against the defendants in that case: Cement Manufacturers Protective Association, its officers and 19 cement companies having mills in Pennsylvania, New Jersey, New York, Maryland and Virginia, which together produced more than 90% of the cement marketed in the northeastern section of the United States; and against the defendants in the related cases described below (argued p. 30 above). The charges included not only the matters referred to in paragraph 1 above but also an agreement to sell only at delivered prices, to establish certain arbitrary basing points and to fix base prices for each basing point.[1] The District Court found for the government and a decree was entered enjoining the defendants from, among other things, agreeing upon mill base prices; arbitrary freight basing points and the sale of cement f.o.b. point of delivery exclusively.[2] We have examined carefully the brief and argument of the government before this Court in that case and all of these charges were pressed before this Court.[3] This Court reversed.[4]

The *Cement Manufacturers Protective Association* case was one of a series brought by the Department of Justice at the same time which, taken together, named all of the principal producers of cement in the country and 100 indi-

[1] Transcript of Record, Supreme Court, Oct. Term, 1924, No. 551, *C. M. P. A.* v. *U. S.*, Petition, pp. 1-19, especially pp. 9-14, 16-17.

[2] Transcript of Record, Supreme Court, Oct. Term 1924 No. 551, *C. M. P. A.* v. *U. S.*, Final Decree, pp. 1809-1813, especially p. 1812.

[3] Brief and Argument on Behalf of the Government in *C. M. P. A.* v. *U. S.*, Sup. Ct., Oct. Term, 1924, No. 551, pp. 111-127.

[4] 268 U. S. 588 (1925).

viduals as defendants.[5] Proceedings in these other cases were suspended pending the outcome of the *Cement Manufacturers Protective Association* case. Following the decision of this Court, all other pending cases were dismissed. The order of the District Court in one of these cases recited:

> "that the facts therein are substantially similar to the facts in the case of *Cement Manufacturers Protective Association, et al.* v. *United States of America*, in which a decision adverse to the contentions of the Government was handed down by the Supreme Court on June 1, 1925."[6]

Our contention here (argued at p. 30 above) is that the decision in the *Cement Manufacturers Protective Association* is *res judicata* as to the legality of the marketing methods of the defendants in all of these cases up to June, 1921. Those defendants included all of the principal producers of cement then in existence in the country.

The marketing methods in issue in those cases are the same as those in issue in the present cases.

3. As a precedent to show the legality of the marketing methods in issue in the present cases, argued pages 85 to 112; 127 to 131 above.

We discuss the first *Cement* case because of the misapprehension concerning the precise holding of this Court

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[5] The other cases were:

U. S. v. *Lehigh Portland Cement Company, et al.*, U. S. D. C., N. D. Ill., No. 3912;

U. S. v. *Midwest Cement Credit and Statistical Bureau*, U. S. D. C., N. D. Ill., in equity, No. 2392;

U. S. v. *Atlas Portland Cement Company, et al.*, U. S. D. C., S. D. N. Y., No. 5631.

[6] *U. S.* v. *Midwest Credit and Statistical Bureau, et al.*, U. S. D. C., N. D. Ill., No. 2392, order January 21, 1926.

expressed in the dissenting opinion of Judge Evans below and because of a like misapprehension expressed in the statements in the Commission's brief that the decision is irrelevant, see pages 40, 117.

Thus, Judge Evans stated that the first *Cement* case is distinguishable from this case, "if for no other reason than that *no* conspiracy was charged in the earlier case" (R. 16818). Judge Evans added that "The instant proceeding is under different statutes * * * The instant proceedings involve different facts. An *agreement* is the heart of the instant case and was absent in the former case" (R. 16818, emphasis added). He added that he could not "accept the earlier Cement Opinion unqualifiedly, but only as affected by the later cases" (R. 16818).

We think that the most recent reference to the *C. M. P. A.* case in this Court makes clear that however else it might be "affected by the later cases", it still stands for the legality of the Institute's services which are here criticized by the Commission. In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945) this Court observed that the decree substantially destroyed the association "even as an innocent trade association for what have been held lawful ends," citing the first *Cement* case among others (p. 428). In so far as the Institute freight rate, specific job contract and statistical services are concerned they stand as lawful activities because as heretofore pointed out[7] they were patterned after and similar to those of the C. M. P. A. Judge Major said they were "within the legal sphere of a trade association as held in the old *Cement* case" (R. 16772). The attempt of the Commission to spell illegal concert of action out of those activities in support of its thesis of conspiracy through the

[7] Pages 59-60, 68-72, *supra*; p. 202, *infra*.

Institute can succeed only if this Court is prepared to overrule its earlier decision.

The emphasis of the Commission in its brief page 40 and of Judge Evans in attempting to distinguish the earlier case, however, rests on the suggested "absence of a charge of agreement in that case" (R. 16818). It is true that in the earlier case the Government did not rely upon any "price-fixing agreement". It is not true that the Commission here found price-fixing. There is nothing in the order to cease and desist in this case about price fixing. There certainly has been no finding of any price fixing. See *supra, pages* 23-25, 125, 134.

As for this Court's decision in the first case, the record, briefs and oral argument in that case and the subsequent antitrust decisions in this Court demonstrate that the basic issue in the first *Cement* case was not "price fixing", but the question of the existence of a combination to restrain competition in violation of the Sherman Law. That is precisely the nature of the combination charged here.

The confusion engendered about the meaning of the earlier case ignores the distinction made many times by this Court between a conspiracy or combination to fix prices and a conspiracy or combination to restrain trade or commerce. Let us look at the first *Cement* case in this light.

At the outset of his opinion in that case Mr. Justice Stone said:

> "The activities of defendants on which the Government bases its case for an injunction may summarily be stated as follows: The Government charges that the defendants, through the activities of the Association, control prices and production of cement within the territorial area served by the several defendants in the following manner: * * *" (268 U. S. at p. 592).

Here the Court refers to specific job contract reporting, freight rate books, exchange of information as to credits and activities at association meetings and continues:

> "The Government asserts that uniformity of prices and limitation of production are *necessary results of these activities* of the defendants. It does not, however, charge any agreement or understanding between the defendants placing limitations on either prices or production * * *" (268 U. S. at p. 592). (Italics added.)

Again near the end of his opinion Mr. Justice Stone was careful to point out (p. 605) "the government does not rely on any agreement or understanding for price maintenance". Instead the charge was a combination for certain specified purposes which the Government contended had the necessary effect of restraining trade. In fact, the defendants did not deny that there was a combination, for certain purposes, as this Court said (p. 603):

> "That a combination existed for the purpose of gathering and distributing these two classes of information is not denied."

What was denied by the defendants was that the activities carried on by the Association did restrain commerce in violation of Section 1 of the Sherman Act.

From the Court's own opinion it is clear that the real interpretation of the phrase "but here the Government does not rely upon agreement or understanding" (p. 606) is that the Government had not relied upon a price fixing agreement but had relied upon showing a restraint on trade as a result of the activities of the trade association, which was admittedly a combination. This Court held that the Government had failed to make out its case because it had not proved any such effect on trade "except

such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action" (p. 606).

If there were any doubt of this it is dispelled by the Government's subsequent petition for rehearing in the first *Cement* case. The entire basis of that petition was that the Court had not properly appreciated the effect of evidence which was before it. And it is clear that the Government never conceded the absence of a claim of agreement or understanding. Thus, at page 41 of the petition for rehearing the Government specifically charged an agreement to maintain prices, stating:

> "In support of the Government's view that the agreement entered into by the defendants was to maintain uniform prices, there is an abundance of testimony to the effect that prices were *met* but never deliberately *cut*."

And in concluding, the petition stated (pp. 47-49):

> "True, there is no direct evidence of an exact agreement * * * entered into by the defendants with a view to establishing uniform prices.
>
> * * * * * *
>
> "We submit that the uniformity shown by this record is not the result of competition but [quoting from the opinion of this Court in the *Hardwood Lumber* case] is so clearly the result of the conduct of men 'united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved'."

In view of this language, it is plain that the Government was relying upon proving the existence of an agreement and combination. And it was the same kind of combination which the Commission is seeking to establish here.

It is also significant to examine the subsequent opinions by Chief Justice Stone who wrote the opinion in the *Cement* case and to see his interpretation of the meaning of that case. Less than two years after the *Cement* case Mr. Justice Stone wrote the opinion in *United States* v. *Trenton Potteries Company* (273 U. S. 392 (1927)). In that case, at page 400, he stated that the decisions in the *Maple Flooring* and *Cement* cases "were made on the assumption that any agreement for *price fixing, if found,* would have been illegal as a matter of law" (emphasis added), and again more recently, in deciding the *Corn Products Refining Co.* v. *Federal Trade Commission* case, 324 U. S. 726 (1945), Chief Justice Stone, referring to the *Maple Flooring* and *Cement* cases, stated (p. 735):

> "But these were suits to restrain violations of the Sherman Act and did not involve the prohibition of the Clayton Act upon discriminations in price. The only question for decision in those cases was whether there was a concerted price-fixing scheme among competing sellers, accomplished in part by their adoption of a uniform basing point system; *in fact no prohibited concert of action was found.*" (Emphasis added.)

The same interpretation is adopted in the case of *United States* v. *Socony-Vacuum Oil Co. Inc.*, 310 U. S. 150 at page 217 (1940), and in all the other antitrust cases before this Court.

IV. The Findings and Proof as to Miscellaneous Marketing Practices Are Not a Substitute For Findings and Proof of the Conspiracy Charged.

Here we consider some of what the Commission's brief refers to as "many kinds of collective action"[1] supposedly "taken by respondents" (whether some or all is not stated) "to prevent * * * any deviation from the identical prices produced by the use and application of respondents' pricing formula" (Com. Br., p. 59). This conduct, it is said, "permits if it does not compel, inference of agreement" (id.). This is indeed an understatement since the Commission actually found agreement as to some of the practices referred to. Counsel, however, means something more, i.e., inference of *the* combination among all of the respondents to use a multiple basing point system. The difficulty with this is that evidence of participation in *any* conspiracy is not competent to prove the conspiracy charged. Moreover, acts of alleged conspirators are not chargeable to their alleged accomplices unless the conspiracy charged is first established by independent proof and even then, the acts and declarations of alleged conspirators are not competent unless during and in furtherance of *that* conspiracy—and narrative accounts of past events are not in that category.

Kotteakos, et al. v. *United States,* 328 U. S. 750, 765-75 (1946);

Morrison v. *California,* 291 U. S. 82, 92-93, (1934);

Brown v. *United States,* 150 U. S. 93, 97-99 (1893);

Logan v. *United States,* 144 U. S. 263, 308-309 (1892);

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[1] The others have already been discussed, *supra* pp. 59-75.

See:

United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344, 408-413 (1922);

Pettibone v. *United States*, 148 U. S. 197, 204, 206 (1893).

These considerations have been consistently ignored by the Commission throughout its findings and argument, but more particularly with respect to the several marketing practices which are the subject of this point.

Moreover none of the matters here discussed is in any way peculiar to the use of a multiple basing point method of pricing as against any other method. In fact, Commission counsel conceded this in the court below as to activities relating to terms and conditions of sale and discounts, classification of dealers and other customers, imported cement, opposition to new mills and the statistical services.[2] In this Court, Commission counsel have added to this concession standardization of the product and public relations activities, stating that they had "no immediate impact on price competition or respondents' pricing system" (Com. Br., p. 22). How then can it seriously be urged that proof relating to these matters constitutes proof of the combination with which we are concerned. In fact, the complaint and the order both refer to these matters only insofar as they relate to use and maintenance of a multiple basing point system.[3]

The lower court was manifestly correct in treating them as immaterial (R. 16769, 16809).

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[2] These were referred to in the Commission's brief below as "various forms of concerted action not peculiar to or inherent in the basing point system." (p. 17)

[3] Compl. Par. 7, R. 91; Order Par. 2, preamble, R. 16135.

A. Proof of the Conspiracy Charged is Not Shown in the Evidence Respecting Deliveries to Buyers' Trucks at the Mill.[1]

The problems incident to delivery to buyers' trucks at the mill were by no means nation-wide. They arose and were acute in some areas and were wholly absent in others. They arose at different times and were met in different ways by the individual companies affected. Where uniformity of action by individual respondents existed in a given area such uniformity was brought about by the pressure of competition in the affected area. All this is plainly demonstrated by the evidence.[2]

Delivery to buyers trucks has not been discontinued by all respondents, nor at all mills. Delivery to trucks has never been discontinued from any of the 19 packing plants in the industry or from any of the 18 mills on the Pacific Coast or from 36 mills east of the Pacific Coast. In the Great Lakes area large amounts of cement are delivered to buyers trucks at the mills, packing plants and warehouses in that area.[3]

The finding that trucking threatened the multiple basing point system of pricing[4] and that it was discouraged or

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[1] Statement of Points, Nos. 21, 40 (c), 44; R. 16261-62, 16285-86, 16288-89.

[2] The evidence with respect to truck delivery is digested in App. III, 1401-1703.

[3] App. III, 1625 for summary of discontinuance east of the Pacific Coast. Evidence showing continued delivery to trucks on the Pacific Coast is digested in App. IV, 2727-29, 2794-2800, 2845. See App. III, 1425-30 for evidence as to delivery to trucks at packing plants, silos and warehouses and delivery in company controlled trucks. See App. III, 1450-84 for evidence as to the variety of pricing policies used in sales to trucks.

[4] Trucking is the only subject among those discussed in this Point IV where the Commission has found or claimed some relation to the basing point system (Com. Br., pp. 21, 75).

eliminated by agreements among the respondents as part of the alleged common plan to maintain that system[5] is a fiction not supported by the evidence. The scraps of "evidence" culled together by the Commission as the basis for this finding distort the facts. They represent fragments and bits of evidence removed from their context and considered apart from other uncontradicted evidence and the suggested inference of "agreements" arises from rank hearsay which is expressly controverted by the competent evidence.

1. The Objections to Delivery to Buyers' Trucks.

The reasons for discontinuing delivery to buyers' trucks at the mill (where such delivery was discontinued) were many and varied.[6] As to the primary consideration, however, there can be no doubt on the basis of the evidence in this record: Unrestricted delivery to customers' trucks undermined the individual manufacturer's relations with his dealers. Most responsible dealers were opposed to unrestricted trucking and dealers are the backbone of the cement business.[7] Their trade was of the utmost importance to the individual manufacturers. The evidence of this fact is voluminous and uncontradicted.[8] Reference to the full context of the very evidence, bits of which are quoted by the

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[5] Fdg. 11 (a) (b), 16045-47.

[6] The reasons shown by the evidence are listed in summary in App. III, 1625-1627.

[7] App. III, 1627, *et seq.* Further evidence of the pressure of dealers upon their individual sources of supply to eliminate truck delivery was excluded at the hearings before the Commission and respondents moved to adduce it in the Court of Appeals. Motion to Adduce Additional Evidence Subject VI, R. 16577-78.

[8] App. IV, 2247-2257.

Commission in the findings,[9] shows this. Thus, Lehigh, in addition to what is quoted in the findings, said:

> "The retail building material dealer found his market invaded by dealers from far distant points. The distant dealer, buying from some manufacturer who sold at a reduced mill price to meet the competition of a mill more favorably situated to his market, might deliver the cement to some intermediate market where he would normally do no business, to the demoralization of that market. The majority of cement dealer accounts are arranged on the basis of the manufacturer giving a dealer in a market the exclusive sale of that manufacturer's brand. Naturally, when an outside dealer made a sale of the sort described, the local dealer handling that brand felt that the manufacturer had broken faith. Cases of this kind were numbered by the hundred and created a general demand from the building material dealers that the cement industry discontinue truck sales. This sentiment grew steadily in strength and made an increasing impression on the cement manufacturers who must depend on the retailer as his market for a large proportion of their output. The dealer also contended, we think soundly, that accepted marketing practices of thirty years standing had established the carload as the wholesale unit, and that when the manufacturer sold in a small unit for truck delivery he was in reality invading the retail field."[10]

The answers to the questionnaire of the other companies to which reference is made in the findings is to like effect.

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[9] Fdg. 11 (b), R. 16046-47.

[10] App. III, 1412-13. The testimony of Lehigh's Vice President Bowen as to the reasons why Lehigh discontinued trucking is digested in App. III, 1627-29.

Thus Universal Atlas, stating why it had eliminated trucking, also said:

> "We had no control over the final destination of the cement to enable us to protect the market of our many customers." (Com. Ex. 968-4H, 4Y) "• • • when it developed that trucking resulted in cement being delivered by customers into towns where they had no investment in retail yards or in other words when we lost control of the final destination and market practices were disrupted, trucking was discontinued. Other companies, we believe had similar experiences in territory adjacent to their mills and discontinued trucking. • • •" (Com. Ex. 971-31 V)[11]

Lone Star in its questionnaire answer for several of its mills stressed the same point; thus for its Nazareth, Pennsylvania, mill the company said:

> "To handle our dealer outlets on a more satisfactory and equitable basis". (Com. Ex. 969-3E; App. III 1635)

Bonner Springs, Kan. Mill:

> "To prevent discrimination in pricing as between customers.
>
> Because certain dealers were taking advantage of location and ability to truck and thereby defeating our dealer sales policy in other towns, causing a general unsatisfactory condition with trade." (Com. Ex. 967-16M; App. III, 1636)

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[11] App. III, 1630. The testimony of Universal Atlas' Vice President Stone, as to the reasons why the company eliminated trucking at some of its mills is digested in App. III, 1631-1633.

Limedale, Ind. Mill:

> "Because of inability to maintain dealer distribution policy and retain our established dealer outlets under same." (Com. Ex. 975-17T; App. III, 1636.)

Houston and Dallas, Texas Mills:

> "Loading trucks was a more expensive operation at the mill warehouse as well as more expensive in our accounting and credit departments. We found our dealer trade dissatisfied due to the following reasons.
>
> 1. Having no control over the trucks we could not maintain our policy of protecting our dealer outlets at the point where they operated yards.
> 2. When we delivered small quantities to trucks our dealer trade took the position that we were definitely engaging in retail business." (Com. Ex. 976-1D, Com. Ex. 976-13Y)[12]

Lawrence's answer quoted in the findings is also incomplete. The Company also said:

> "The Complaints we received and the many controversies with our trade forced the abandonment of the policy." (Com. Ex. 969-6P)[13]

Ackerman, Sales Manager of Lawrence, explained this when called to testify as a Commission's witness:

> "• • • I look upon our company as a wholesaler of cement, not a retailer. We depend on our dealers

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[12] App. III, 1636. The testimony of Koch, Vice President and Neylan, Assistant General Sales Manager, of Lone Star as to the reasons for discontinuing trucking, at some of its mills is digested in App. III, 1636-38.

[13] App. III, 1645. The testimony of Ackerman, Sales Manager of Lawrence, as to why the company stopped delivery to buyers' trucks is digested in App. III, 1645-47.

as our retailers. We were in constant controversy and argument for various reasons with our customers, and I learned early in my selling experience, that when you get into a controversy with your customer, you usually win the argument but lose the customer." (R. 2824)

Further:

"Q. Did your experience in selling for delivery in trucks result in inability to know what the delivered price was of given places?

A. Why, that naturally followed. That is, it naturally—if I understand your question—it naturally followed. I don't know what the other man figured as his cost when he came with his truck and carted it away.

Q. Well——

A. (Interrupting) Let me explain this, please.

Q. Go ahead.

A. This mill is up in Maine. Maine is essentially an agricultural State. Our experience showed that truckers on potatoes from Arista County came by the mill from Searsport, maybe as far as Boston. We found those trucks returning empty. They stopped at the mill for a load of cement on an order of some dealer. We found cases where cement was peddled along the road, in some cases, under the nose of our own customer.

Q. At cut prices?

A. Wait a minute. Let me finish. We received complaints from our own dealer as to why it was he had received no protection from us. He was a customer of ours; why was somebody else in that town selling cement in his area?

Q. And at lower prices?

A. Well, no doubt that is what caused him to complain. Now he simply said to us, 'Control that

situation as far as I am concerned, or I won't buy any more of your cement.'

• • • • •

Q. Did that whole situation as to the trucking there, in your opinion, tend to break down the delivered prices that were calculated on a rail basis?

A. Not necessarily. It was not a question, as I view it, of breaking down the delivered prices. It was a question of doing what your best customers asked you to do, the people that you depend on for your business." (R. 2825-26)

The full answer of Trinity, part of which is quoted in the findings, includes the following statement for its Dallas (Eagle Ford) mill:

"• • • To assure ourselves of uniform haulage cost to destination.

Unsatisfactory to purchasers of cement due to this inability to definitely figure cost on a given project at time of making bid." (Com. Ex. 976-13K)[14]

Every respondent which took steps to control truck delivery stressed as the reason the devastating effect on its dealer relations.[15] By omitting any reference to this important fact while seizing upon words and phrases out of context, the Commission has distorted the evidence, and attempted to conjure up a connection between the elimination of trucking by some of the respondents and the use of a multiple basing point method of pricing. The materiality of

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[14] App. III, 1666-67. There was no testimony by Trinity on this subject.

[15] All of the questionnaire answers of all the other respondents and the testimony on this subject are given in full context in App. III, 1630-66.

the trucking evidence to the Commission's case and its sufficiency, hangs on this tenuous thread of connection, because it is the Commission's thesis that the trucking problem was part of the alleged conspiracy to use and maintain a "multiple basing point system". Without that connection the whole subject is extraneous to any issue. This is clear from the Commission's brief (p. 69, 74) and from both the complaint and the order which refer to activities in connection with truck delivery only in so far as they were pursuant to or in aid of the alleged underlying conspiracy.[16] We contend that the Commission has no substantial evidence upon which to predicate this connection and has resorted to the selected distortion of the evidence, referred to, in an attempt to supply it. The findings in Paragraph 11 should therefore be set aside and ignored by this Court as they were by the Court of Appeals. This does not require any "weighing" of the evidence by the Court nor does it require the Court to substitute its own inference from the evidence for that of the Commission.

The principle applicable here was well stated by Chief Justice Rosenberry of the Supreme Court of Wisconsin in *Tesch* v. *Industrial Commission*, 200 Wisc. 616, 229 N. W. 194, (1930) when he pointed out that the Wisconsin statute giving only limited review to the findings of the Industrial Commission of that State in so far as it relieves the court of responsibility of reviewing findings, "adds to the dignity and responsibility of the Commission when it makes these findings conclusive." (p. 197) He then added:

> "The attempt to support a finding by taking bits of testimony out of their context and considering

[16] Complaint, Par. Seven, preamble and subparagraph (b), R. 91, 117. Order, Preamble and Par. 2, subparagraph (b), R. 16135.

them alone apart from other undisputed circumstances in the case, and then claiming that a finding supported in that manner is beyond review because supported by testimony, is wholly inconsistent with the fundamental principles embodied in the legal concept of a hearing as that term is used in American law. Considered in connection with the remainder of the testimony, the portions quoted become wholly insignificant and tend to support the opposite conclusion." (p. 197)

This opinion is in keeping with the following principles laid down by this Court and others:

1. Incompetent evidence, including uncorroborated hearsay, does not constitute substantial evidence.

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 229-30 (1938);
A. E. Staley Manufacturing Co. v. *National Labor Relations Board*, 117 F. (2d) 868, 876 (C. C. A. 7th, 1940).

2. Inferences piled on inferences are unreasonable and do not constitute substantial evidence.

Interlake Iron Corp. v. *National Labor Relations Board*, 131 F. (2d) 129, 133 (C. C. A. 7th, 1942);
National Labor Relations Board v. *Pick Mfg. Co.*, 135 F. (2d) 329, 333 (C. C. A. 7th, 1943).

3. To be conclusive, findings as to the facts by the Commission must be supported by evidence which, when considered in relation to all relevant and uncontradicted facts, affords a substantial and reasonable basis for the facts found.

National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300 (1939);

National Labor Relations Board v. *Duncan Foundry & Machine Works, Inc.*, 142 F. (2d) 594, 596-97 (C. C. A. 7th, 1944);

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 580-582 (1923);

Hazel-Atlas Glass Co. v. *National Labor Relations Board*, 127 F. (2d) 109, 114-115, 117 (C. C. A. 4th, 1942).

4. Proof of conspiracy by circumstantial evidence must be found upon consideration of all the circumstances and may not rest upon selected portions considered alone.

See:

Federal Trade Commission v. *Curtis Publishing Co., supra;*

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333, 339-341 (1933);

J. B. Lippincott Co. v. *Federal Trade Commission*, 137 F. (2d) 490, 494-495 (C. C. A. 3rd, 1943).

2. *The Evidence as to Respondents' Action Does Not Show Either Unity or Agreement.*

The suggested inference in the findings that the action taken by various respondents to discourage or eliminate trucking from their mills was part of some agreement among them for the purpose of maintaining a multiple basing point system; is unsupportable. Here again the Commission has selected bits of evidence removed from their context and considered apart from the other evidence and, in addition, relies upon third party writings representing rank hearsay. In the few instances where respondents

were given an opportunity to cross-examine the authors of these third party writings, their sworn testimony as shown below contradicted the implication in the writings seized upon by the Commission to support findings.

In the cases where the authors were not produced for cross-examination, the only competent evidence on the subject completely refutes the writings. We know of no authority, which permits the Commission to rely for findings upon such "evidence" when all the competent evidence is to the contrary.

As a starting point for its innuendo of agreement the Commission points to the addition by some mills of a 15 cent per barrel charge for delivery to trucks. In Par. 11 (c) (R. 16047-48) of the findings it is suggested that a 15 cent charge was universal in the industry, and that it was adopted pursuant to some "plan", first in the east, and then later simultaneously in the "midwest". No part of this implication is supported by the evidence.

The evidence shows that a charge for delivery to trucks was far from universal and that where it was made, it varied from 6 to 25 cents.[17] The charge was intended to compensate the manufacturer for the added handling and loading expenses incident to small scale delivery to buyers' trucks.[18] The practical difficulties of such delivery to trucks are noted by the Commission but given no significance in the findings.[19] Even in the Lehigh Valley area, with respect to which the findings quote from Wing's memorandum to suggest that there was a "plan" afoot to make

[17] App. III, 1505, 1522-23.

[18] App. III, 1494-1505, 1512-22, 1523-25.

[19] Fdg. 11 (b) R. 16046-47. The evidence on this point is digested in App. III, 1430-39.

such a charge, two respondents did not adopt any such charge,[20] and those who did, did so over a period which ended 11 months after Wing wrote that a plan was brewing.[21] This time lag, we submit is wholly consistent with the sworn testimony of responsible executives of the Lehigh Valley manufacturers who denied the existence of any agreement or understanding, and who explained why they each followed the practice after it had been initiated by one Lehigh Valley shipper.[22] Here is a case where many companies individually followed this lead and no illegality attaches to such action.

United States v. *International Harvester Co.*, 274 U. S. 693, 708-09 (1927);
Cement Manufacturers' Protective Association v. *United States*, 268 U. S. 588, 605 (1925);
United States v. *U. S. Steel Corporation*, 251 U. S. 417 (1920);
United States v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288, 316 (E. D. Mo., 1931).

In all areas of the country different leaders at different times attracted different numbers of followers, if any. The evidence is spotty.[23] Thus, in Districts 1 and 2, seven companies operating four mills and four packing plants or warehouses never had any truck loading charge; in Districts 3, 4 and 5 out of a total of fifty-four mills and packing plants operated by twenty-four companies, thirty, operated by nineteen companies never had any charge for loading

[20] App. III, 1486.
[21] *Id.*, pp. 1485-86.
[22] *Id.*, pp. 1494-1505.
[23] *Id.*, pp. 1485, et seq.

trucks; of the nineteen mills in District 6, only the two Penn-Dixie mills had any charge; of the twelve mills in District 7, only the State-owned, non-respondent South Dakota State plant and Alpha's St. Louis plant had any charge; of the thirteen mills in District 8, six had no charge; of the nine mills in District 9, only the El Paso mill of Southwestern had a charge; and of the eight mills in District 10, only the two mills of Colorado had a charge.[24]

The telegram dated November 19, 1929 (Com. Ex. 1270 A) quoted in the findings (Par. 11 (c) R. 16047-48) has no significance when it is revealed that it was a telegram between representatives of a single company, that "Clugston" referred to in the telegram was a sales manager of the same company, and that there is not a line of further evidence in the record as to the meeting referred to or the significance of the facts stated in the wire. On its face the telegram points to the absence of agreement on a truck charge. But more than that, the other evidence shows that the telegram was sent eight months before any mill in the Buffington area adopted a truck charge. To be sure, Universal Atlas did, as the findings state, "subsequently impose" a 15 cent charge, but it did so in August 1930, over nine months after the telegram referred to had been sent, and under circumstances which are fully explained by direct sworn evidence. In addition, Universal Atlas dropped a charge for trucking in March 1931, after six other companies in that area had done so.[25]

These facts are uncontradicted. They show no common plan. They show no agreement nor any basis for inference

[24] App. III, 1485-86, 1505-10, 1522-25.

[25] *Id.*, pp. 1507-11.

of agreement. They show no connection whatever with the use of a multiple basing point system of pricing.

THE INCOMPETENT THIRD PARTY WRITINGS.

The Commission has no authority to rely, for findings which are conclusive on the Court, upon the hearsay evidence of transactions of cement dealer associations and railroads to prevail upon manufacturers to abandon trucking. These efforts are reflected in the third party writings of dealer associations and railroad representatives liberally quoted in the findings.[26] The Commission has not sustained the burden necessary to make such evidence the basis for findings against the respondents, namely, that these dealer associations and railroad executives were engaged with these respondents in a conspiracy to maintain a multiple basing point system. We submit that the Commission must have shown this and shown it by something more substantial than the unsworn writings of these third parties. If that were not so, any letter written by a third party which mentioned a respondent or its activity could be used against that respondent by the mere expedient of labeling that third party a co-conspirator. That has never been the law.

Hitchman Coal & Coke Co. v. *Mitchell, et al.*, 245 U. S. 229 at 249 (1917);

Glasser v. *United States*, 315 U. S. 60, 74-75 (1942);

Consolidated Grocery Co. v. *Hammond*, 175 Fed. 641, 645-46 (C. C. A. 5th, 1910);

United States v. *Aluminum Co. of America*, 1 F. R. D. 1, 7 (D. C. S. D. N. Y., 1939).

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[26] Fdg. 11 (e), (f), R. 16049-54.

The whole story of the dealer-railroad activities in connection with trucking of cement and the virtual bystander position of the manufacturers in these activities is summed up in the testimony of Mr. Eysmans, Vice President of the Pennsylvania Railroad, a Commission witness, whose activities are spotlighted in the findings. Referring to the meeting which the Commission relies on as evidence of purpose and agreement on the part of the respondents, Mr. Eysmans testified as follows:

> "Well, it was the general plight of the industry, and by that I mean the men in the *supply business* were having apparently a considerable lot of difficulty in transacting their business because the trucks had crept into it in such a way that there was no stability as to what prices were, and a great deal of havoc apparently going on. Now, I can not just differentiate in my own mind as to whether some of these things I am going to say were actually brought out at that meeting or whether it was my own knowledge of the situation that we had discovered ourselves over a period of years, but *the supply men* complained at that particular meeting, however, that the business had practically gone haywire, because of the entrance of the trucks.
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> • • • • •
>
> Mr. Campbell was the spokesman, and there was one other gentleman that I am sure was in the supply business—I don't recall his name—that spoke. *If there were any manufacturers there, they did not impress me that they were making any point on this situation at all. I think they were there pretty much as we were, listening to what was to be said.* I mean it was all discussion of the supply people. I don't recall their difficulties. There was nobody got up there as a manufacturer, a cement manufacturer and

described that he had any difficulties that were being covered along the line that Mr. Campbell had developed at the meeting." (Italics ours)[27]

This testimony of a Commission witness stands uncontradicted.

The fragments of evidence recited by the Commission in this connection, when subjected to analysis in the light of the whole evidence on the subject, are shown to be palpably misleading and contrary to the true facts. We do not labor the point but refer the Court to a complete report of all the evidence of the dealer and railroad activities in full context in App. III, 1530-1567.

The unreliable character of the piecemeal recitals of third party evidence and its inability to stand the spot-light of cross-examination is typically apparent from the cross-examination of Mr. Duffy, Vice President of the Lehigh Valley Railroad, another Commission witness, whose letter quoted in the findings suggests that there "has been an agreement among the cement companies."[28] His cross-examination on this point follows:

> "A. There has been a great deal of discussion of our desire to get business on the railroads. I naturally did not know of any agreement and whatever I stated there undoubtedly was—well, an exaggeration as it is being applied here. What I was concerned with here was that we got the business on the railroads and I knew nothing of any agreement of any sort among the cement people. I was more interested in the agreement that they would ship by railroad.

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[27] App. III, 1539-40.

[28] Fdg. 11 (e), R. 16052.

By Examiner Norwood:

"Q. Had they agreed with you?

A. No, sir, they had not.

Q. Then you just stated something that wasn't true?

A. That it—as I say, it was an exaggeration.

* * * * * *

By Mr. Leisure:

Q. And did you mean to convey to Mr. Collyer that you had any personal knowledge, and, did you have any personal knowledge, on September 3, 1931, that any cement companies had agreed to anything among themselves about fifteen cents a barrel?

A. I had neither the knowledge nor did I intend to convey that information.

Q. Now, I notice in the next paragraph, Mr. Duffy, you state that Messrs Hogan and Koch expressed an attitude similar to that of Mr. Smith. Did you mean to convey to Mr. Collyer in this letter on that day that Mr. Hogan's company or Mr. Koch's company had entered into any agreements either with you or with anyone else with respect to fifteen cents a barrel on cement?

A. I did not.

Q. I notice in the last paragraph you used the phrase 'general agreement that some charge should be made.' What did you mean by that?

A. May I see that?

Q. Yes. Look at it, right in the third line in the last paragraph (handing paper).

A. I would say that that was probably the wish being father of the thought to a considerable degree. We were anxious to have each one of them agree to put this charge of fifteen cents a barrel on. We found some sympathetic attitude towards the railroads in the matter, but that was all I intended to imply.

Q. So following your last answer you want the examiner to understand that when you were working on this proposition, and you found someone who had expressed a sympathetic attitude, that you may have described that to someone else as an agreement—they have a sympathetic attitude—or do you want the Examiner to understand, and did you intend to convey when you wrote it that you knew of some agreement between the cement companies to do this?

A. Answering your last question first, I know nothing of any such agreement. I have no knowledge of any such thing. And my whole effort, and my whole purpose in writing that letter was to show that we were making some progress in endeavoring to prevail upon the several cement companies who were assigned to me—you understand, this was divided among a group of traffic executives—that among those that I called upon, I thought that we were making some progress in getting those individual companies to apply the fifteen cents a barrel charge which we desired.

Q. And you had no intention of implying that there was an agreement between the companies to do it?

A. Absolutely not.

Q. Or that they had entered into an agreement with you to do it?

A. No—no—I wish I had."[29]

The discontinuance of trucking where it was discontinued was plainly the result of adjustment by individual manufacturers of their policies in the face of the exigencies

[29] App. III, 1489-91.

of competition. This is clear from the volume of uncontradicted testimony by the executives of the companies concerned. Even in the small area of western Pennsylvania and southern Ohio, with which recitals in the findings deal for the purpose of suggesting agreement, the chronology of dates on which delivery to trucks was discontinued, even without the supporting evidence, shows that it was a gradual competitive development. The earliest discontinuance was West Penn in May of 1931[30]. Its nearest neighbor, Medusa, did not announce its decision to discontinue until November 20, and the nearby Universal Atlas mill at Pittsburgh made its announcement seven days later on November 27.[31] In southern Ohio, Alpha at Ironton decided to discontinue on December 11, but its neighbor Superior waited until April of the following year.[32] These gaps in time are ignored in the findings, yet they are shown by undisputed competent evidence. We submit that these actions do not reflect any planned program of conspirators, but on the contrary show the normal and studied reactions of individual businessmen adjusting their practices to meet the developments of a highly competitive and sensitive market.[33]

Here again is a plain case of different companies in different areas at different times following or not following different leaders. This is not the story of conspirators.

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[30] App. III, 1590-98.

[31] *Id.*, p. 1591.

[32] *Id.*, pp. 1591-92.

[33] See the evidence showing the reason for discontinuance of delivery to buyer trucks, App. III, 1625-67. Other evidence of the dealers' opposition expressed to respondents was rejected and respondents moved to adduce it in the Court of Appeals. See Motion to Adduce Additional Evidence, Subject VI, R. 16577-78.

3. *The Institute Had No Connection With the Trucking Problem.*

In the court below the Commission argued that the Institute had participated in the matters relating to truck delivery of cement, relying primarily upon the finding that D. H. McFarland, President of the Institute, attended a meeting in 1931 (Fdg. 11 (e) R. 16049). Here, without arguing the point, Commission counsel merely point out that "the president of the Institute" attended a meeting of dealers and railroad representatives which "had as its purpose discussion of means to eliminate and control trucking" (Com. Br., p. 75, referring to Fdg. 11 (e)[1] R. 16049). The implication, of course, is that the Institute participated in the meeting and all events thereafter. The finding is misleading and the implication untrue.

At the time of this meeting, McFarland, it is true, held the title of President of the Institute, but he also was Vice President of the Medusa Portland Cement Company, with plants in Ohio and Pennsylvania, where trucking difficulties were acute, and he testified that when he attended this meeting he represented his own company. He was listed in the minutes of the conference as "Mr. D. H. McFarland, Medusa Portland Cement Company" (App. III, 1537). It will also be recalled that the Institute was a dormant organization from May, 1931, until June, 1933, which included the whole period of the so-called trucking problem. Its membership during that period was at its lowest point, with only 20 companies. No meetings, either of the members or of the trustees, were held during this period, no authority was delegated by any member to McFarland to act for the Institute and McFarland made no report to the Institute (App.

[1] The citation of Fdg. 10 by the Commission in this connection is obviously an error.

III, 1541). There is not a line of evidence that the Institute took action of any kind and McFarland denied any Institute connection with the matter (App. III, 1535).

On the basis of the foregoing facts alone, we think it plain that the whole evidence as distinguished from the fragments relied upon by the Commission, does not support its charge of Institute connection with these matters.

We do not deny that a number of companies in the Ohio and western Pennsylvania areas placed individual restrictions on the extent to which they would deliver to buyers' trucks, during late 1931 and 1932 but, confronted with its many disadvantages and with their most important customers—the dealers—admittedly organized against it, it is small wonder that many companies did stop delivery to trucks (See the evidence: App. III, 1625-1667). And as Campbell, President of the National Builders' Supply Association, testified, "a lot of the plants were still open (to trucks) and are open today" to trucks (App. III, 1625, R. 2040).

B. The Commission Has Not Proved and Found the Conspiracy Charged in the Activities and Policies of Respondents Dealing With Terms and Conditions of Sale.[1]

The findings as to terms and conditions of sale are referred to in the Commission's brief at pages 45, 78 and 94, footnote 57. These findings in part misrepresent the evidence and, in so far as they suggest agreement among the respondents to use or adopt the discounts and terms

[1] Statement of Points, No. 24, R. 16265-68. The evidence on this subject is digested in App. IV, 2559-2621. The terms and conditions of sale prevailing in the industry are enumerated and references thereto which appeared in the Code of Ethics and the Compendium (both of which are set forth verbatim in App. III, 1835-43, 1852-1860) are cited.

and conditions of sale referred to, are not supported by any evidence. There can be no doubt that discounts and terms and conditions of sale in any given marketing area, like prices, become substantially uniform at any given time and when one manufacturer changes the terms and conditions of sale to the advantage of a buyer, other manufacturers must do the same thing or suffer the loss of their trade. It is the insistent pressure from the buyer that brings this about as the evidence plainly shows.[2] Men do not conspire to do what competition compels them to do, and responsible executives have denied any agreement on this subject.[3]

The Commission's findings on terms and conditions of sale are in Par. 14. The first sentence reads:

> "Prices which appear to be uniform may be affected by differences in the accompanying terms and conditions of sale. Standardization of terms and conditions of sale is needed to effect complete and total price uniformity." (Fdg. 14 (a), R. 16065)

So far as this is a generalization applicable to all types of commercial transactions it is true and respondents accept it. The findings go on to state:

> "Respondents' multiple basing-point delivered-price system has been supplemented by uniformity of terms and conditions of sale brought about by collective action. The process of standardizing these terms and conditions through collective action did

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[2] App. IV, 2515-58.

[3] *Id.*, pp. 2912-15. We do not in this case have uniformity of action "unexplained" as in the *Interstate Circuit* case, 306 U. S. 208 (1939) a point which seems consistently to have escaped the notice of Commission counsel in their reliance upon that case in this and other connections.

not begin with the Institute, although it carried forward, supported, and supplemented the uniformity previously created." (Id)

To show the "uniformity previously created", the Commission sets forth in subparagraphs (b) and (c) excerpts from minutes of meetings of the defunct Association of American Portland Cement Manufacturers in 1905, 1906, and 1915, together with excerpts from a pamphlet published by the Portland Cement Association in 1919 (R. 16065-69). This ancient evidence is not proof of the conspiracy beginning in 1929 now relied upon by the Commission.[4]

The findings then turn to the Institute Code of Ethics of 1929 as the basis for the "collective action" through the Institute and state that substantial uniformity, having existed in preceding years, it was unnecessary to make minute provisions when the Institute was organized. "Affirmation in broad terms was sufficient" (Fdg. 14 (d), R. 16069).

This "affirmation" is found by the Commission in five provisions of the Code of Ethics which are paraphrased in the findings. Two of them are misrepresented, as follows:

1. The findings state that the Code prohibited:

> "2. The payment or absorption by the manufacturer of costs for testing cement for a purchaser." (Fdg. 14 (d), R. 16069)

The Code did not so provide. The findings omit the important clause that follows in the Code "unless at the same time the manufacturer shall publicly offer to pay or absorb such charges for all purchasers or users."[5] Here

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[4] See Argument, pp. 26-30, *supra*.

[5] App. III, 1836-37. For the full text of the Code of Ethics see *id.* pp. 1835-43.

is no more than an affirmation that *if* this cost is paid or absorbed it shall be paid or absorbed for all buyers.

2. The findings state that the Code prohibited:

> "4. Failure to require payment of the manufacturer's published charges for packages and the making of payment or allowances for unserviceable sacks returned or for sacks of another manufacturer." (Fdg. 14 (d), R. 16069)

The Code did not so provide. As to payment of the manufacturer's published charges for packages, the Code provided that it was an unfair trade practice for a manufacturer to pay or allow more or less than the buyer was entitled to under the manufacturer's published terms and conditions.[6] As to payment or allowance for unserviceable sacks returned or for sacks of another manufacturer, again the Code provided that such payment or allowance was an unfair trade practice "when to do so is different from or contrary to the terms and conditions of sale of any such manufacturer."[7] Here again there is not a word to suggest what terms and conditions, if any, a manufacturer may or should publish. In the Commission's argument, the misrepresentation is carried further by stating that the Code of Ethics was "agreed to by members" (Com. Br., p. 45), whereas the fact is only the original 12 signed it and the Code was cancelled before the great majority of members joined the Institute at the time of N. R. A. in 1933.[8]

We submit that it ill becomes this Commission, charged as it is with the maintenance of fair competition in Amer-

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[6] App. III, 1840-41.

[7] App. III, 1841.

[8] See pp. 49-52, 54, *supra*.

ican industry, to misrepresent these two provisions and point to them as evidence of conspiracy. These two and the other three provisions paraphrased in Fdg. 14 (d) (R. 16069-70) do not even suggest what a manufacturer's terms and conditions of sale shall be. They merely declare that whatever they may be, fair competition requires that they be made available to all buyers alike.

What has just been said applies with equal force to the brief reference in subparagraph (g) of Fdg. 14 to the somewhat different terms of the Compendium of Established Terms and Marketing Methods distributed by the Institute in December, 1935 (R. 16071).[9] In subparagraph (f) the finding mentions the provisions of the NRA Code for the cement industry (R. 16070-71). As to this we point to our earlier argument that this evidence has been improperly used in this record.[10]

The gist of this matter of terms and conditions of sale was succinctly stated by Ackerman, Vice President of Lawrence, on cross examination, as follows:

> "A. Well, Mr. Paulson, I don't know what my other competitors may be offering. I am using every sales effort that I can think of to obtain business. Now, I imagine the other sales managers are doing the same thing or they wouldn't keep their jobs.
>
> Q. Has it been your experience that you have offered anything to a dealer that is not offered by your competitors, with the exception of the brand?
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> A. Well, I offered a lot of our dealers a lower price one time, but shortly afterwards my competitors followed suit. I extended terms one time, but

[9] See also the facts as to the Compendium, *supra*, pp. 75-78.

[10] See Argument, pp. 31-41, *supra*.

they followed suit. I wish I could think of something that I could do that they won't match me with that will enable me to get the business.'"[11]

C. The Commission Has Not Proved and Found the Conspiracy Charged in the Activities and Policies of Respondents Dealing With the Qualifications of Dealers and the Classification of Customers.[1]

1. There is No Proof of Conspiracy to Agree Upon Those Who Will be Sold as Dealers.

At the outset, the findings point to a recommendation of the Association of American Portland Cement Manufacturers in 1915, made twenty-two years before the filing of the complaint and a recommendation of the Portland Cement Association in 1919, made eighteen years before the filing of the complaint, that those who should be recognized as dealers are those who are regularly engaged in, and properly equipped to conduct, the business of retailing building supplies (Fdg. 17 (b) (R. 16090-91)). But, there is no evidence in this record to show that these old recommendations found in this old evidence from the first *Cement* case[2] were ever implemented or even carried out by agreement or otherwise, in those early days or later. We say again that this old evidence has no place in this record as support for a charge of conspiracy which began in August 1929 against the respondents now before this Court.[3]

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[11] App. IV, 2962.

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[1] Statement of Points. Nos. 27 and 28, R. 16272-74.

[2] Com. Ex. 3192 referred to in this finding was Gov. Ex. 243, in the first *Cement* case, as appears from the face of the exhibit.

[3] See Argument, pp. 26-30, *supra*.

There was no definition of a dealer in the Code of Ethics of the Institute nor is there one in the Compendium. There is no single instance throughout the history of the industry in which it is recorded that any measure was ever taken by any manufacturers, group of manufacturers or association of manufacturers in the cement industry to discipline any company because it sold cement to anybody.

A number of executives testified to complete independence at all times in their experience in the selection of their dealers and no less than twenty-seven, testifying upon this subject, specifically denied any agreement between manufacturers as to whom they would sell as dealers.[4]

Coogan, Vice President of Alpha, testified that his company had to have some yardstick as to who was and who was not a dealer in order that it could determine who was to be sold for the retail trade and who was not and that his company had had such a yardstick since 1903.[5] The President of Hercules testified that the company's best customer is the legitimate dealer and that if Hercules sells a feed store in one town the dealer in the next town who handles a full line of building materials will not give it any business.[6] The manufacturer has to recognize the fact that the regularly constituted dealers who have facilities for handling cement and an interest in cement sales must be protected in that interest or his company will have to go without business from them. The State-owned South Dakota plant, a non respondent, followed the same practice. It's manager testified that that company operated under a definition of dealer substantially like that included in the N. R. A. Code,

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[4] App. IV, 2275-84, 2912-14.

[5] *Id.*, pp. 2257-58, 2263.

[6] *Id.*, pp. 2260-61.

since it began business in 1925. It was "quite necessary", he said, to have a standard of what constitutes a dealer.[7]

Respondents testified that their companies proceeded in the selection of their dealers according to their own independent idea of what constituted a dealer, but that in the application of their ideas they had flexibility and complete independence and the local conditions governed.[8] Thus in one place Alpha's dealer is a florist;[9] in another Hermitage's dealer is a druggist.[10] The size of the market and the equipment available in the hands of any possible dealer for handling cement and serving customers, credit risks, and other factors determine the judgment of each company as to whom it will sell as dealers. There is no evidence that in any particular market competitors all sold to the same persons and refused to sell to others. Witnesses who testified on the subject made clear that in many instances they sold to people to whom competitors were not selling and in many cases they would refuse to recognize a person as qualified to be their dealer who was being sold by competitors, and that membership of a prospective dealer in any association of dealers had nothing to do with their selection or rejection of him.[11]

We conclude that there is no support for the findings on this subject. Here as elsewhere the Commission has ignored the uncontradicted testimony in this record.

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[7] App. IV, 2268; R. 12684-85.

[8] *Id.*, 2257-63.

[9] *Id.*, pp. 2258, 2281.

[10] *Id.*, p. 2281.

[11] *Id.*, 2257-63, 2271-75, 2539-43.

2. *There is No Proof of Conspiracy to Sell Certain Classes of Work Directly and Other Classes Only Through Dealers.*

For more than twenty-five years prior to the issuance of the complaint manufacturers sold their product to dealers for resale and directly to railroads, contractors on certain types of jobs, large products manufacturers and to governments, state and federal, and their subdivisions.[1]

The history of the development of the distinction between dealer and direct sales was outlined at length by Coogan, Vice President of Alpha and other witnesses gave similar testimony as to the nature of the problem of distinguishing those sales which could best be served by the local dealer and those in which the dealer's services were not necessary and which were therefore more economically served by direct sales.[2] In the fall of 1930 Lehigh announced a new policy to its dealers known as the Lehigh Dealer Service Plan. Some companies thought it good and followed it. Others did not and did not follow it. The dealers as a whole rejected it and Lehigh lost sales to its competitors.[3] Dealers demanded of individual manufacturers what their policy was to be as to trade to be sold direct and trade which they could expect to be protected by their suppliers.[4] In response to this demand, one by one, manufacturers published announcements of their policies, all of them giving expression to a classification of business that had grown up gradually through the years. Finally Lehigh formally announced the abandonment of the so-called Lehigh plan and

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[1] App. IV, 2285.

[2] *Id.*, pp. 2285-96.

[3] *Id.*, pp. 2458-72.

[4] *Id.*, p. 2293.

made an announcement in March 1931 to its dealers of the type of business it would sell direct.[5]

The matter found formal expression for the first time in Article XI of the N. R. A. Code in terms substantially as set forth in the quotation from the Code draft in Fdg. 17 (d).[6] Not quite two months after the Code was approved these provisions in Article XI were suspended by order of the Administrator. The Commission so finds,[7] but omits to state why. The evidence, however, is uncontradicted that the dealers who were then organized under their own Code desired to have all cement sold through them and as the first step in that effort they sought the suspension of this provision of the Cement Code. Reiter, subsequently Chairman of the Cement Code Authority and called as a witness by the Commission, testified: "There are ninety cement manufacturers in the United States, and there are thirty thousand dealers. And they have a lot more influence than we did. And the Administrator after this hearing just ordered that it be suspended."[8]

The findings, Par. 17 (d), recite a mimeographed memorandum dated 2/17/34 produced from the files of Colorado. It is addressed "Memo to Sales Managers:" and signed "McC."[9] The memorandum states "Attached hereto a complete copy of Cement Trade Practices revised to and made effective February 17, 1934." The attached sheets describe a division of customers in detail, following generally the pattern indicated in the N. R. A. Code. The find-

[5] App. IV, 2292-96.

[6] R. 16093-94.

[7] Fdg. 17 (d), R. 16094.

[8] App. IV, 2306.

[9] R. 16094. See App. IV, 2308-10.

ings attribute this memorandum by innuendo to Baxter McClain, Manager of the Kansas City Division of the Institute. Then after describing the paper the finding states: "The record does not show similar action by other divisions of the Institute at that time and there is evidence that considerable confusion and uncertainty developed" (Fdg. 17 (d), R. 16094-96). There is no evidence on which to attribute this memorandum to Baxter McClain and the Commission made no effort to do so when McClain was on the stand as a Commission witness. It was none of his business as Manager of a division office to send memoranda to sales managers. There is no evidence that any Institute officer or employees issued any memos to sales managers. However, in the absence of any evidence that the Institute ever concerned itself with the classification of customers in the cement industry[10] the Commission was hard put to it to drive the Institute into the situation.

In still another effort to involve the industry as a unit in the business of its separate parts, the Commission in Fdg. 17 (d) states that on April 16, 1934 (that is after the suspension of the provisions of Article XI of the Code classifying customers) the chairman of the Code Authority advised all members of the industry "how they may quote a contractor for sale by a dealer a price fixed for such resale by such dealer".[11] This ruling by the Code Authority did not relate to any classification of customers. It was a ruling as to Article IX of the Code requiring the manufacturer to file any price at which he sold cement and this interpretation explained to the manufac-

[10] See App. IV, 2297-98.

[11] R. 16095.

turer how he might sell to the contractor for the account of a dealer and at the same time protect the dealer's markup.[12] This was a proper Code Authority function.

The finding goes on to state: "In the meantime, agreements between respondents and dealers were worked out with respect to classification of trade and division of business between respondents and dealers" (R. 16095). In support of this the Commission cites a letter from the Code Authority to members of the industry enclosing a revised draft of Article XI which the Code Authority intended to present to N. R. A. as a substitute for the provisions suspended. Since the provisions suspended had been suspended at the behest of the dealers it was unlikely that a substitute would be accepted if it was objected to by the dealers and it was necessary therefor for a conference to be held with dealer representatives before any steps for a revision could reasonably hope for success. It appears that the dealers were willing to permit the manufacturers to propose an amendment to their Code upon a test basis of a four or six months trial period and upon that condition they would not oppose it.[13] Such were the conditions imparted to industrial life in America by N. I. R. A. now cited against these respondents as evidence of conspiracy to violate the law.

The effort to establish a policy acceptable to N. R. A. which would then be binding upon the industry was not successful and the matter therefore rested where it always has except for two brief months under N. R. A. that is, in the hands of the individual manufacturers. The evidence shows that dealers were anxious to know what part of the cement

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[12] App. IV, 2498-99, App. II, 617-618.

[13] App. IV, 2312.

sales they would be allowed to handle.[14] Naturally dealers cannot compete with manufacturers in sales to contractors when the manufacturer sells the contractor at the same price at which he does the dealer and the dealer, wishing to know what business is open to him, wants to know what the policy of the manufacturer is. Therefore in the spring of 1935 many manufacturers published announcements to their dealers. The first one to be issued was by Lehigh and its issuance stimulated inquiry by dealers of other manufacturers who responded by announcements more or less similar in effect.[15]

The findings, Par. 17 (e), state "Similar policies which grew out of conferences and agreements between respondents and dealers having been announced by various of the corporate respondents, the National Federation of Building Supply Associations advised its directors 'and also several hundred outstanding dealers through the United States' under date of February 25, 1935, in part:

> " 'You will find enclosed a typical statement of policy such as is being issued by individual cement companies throughout the United States. So far as they have been issued by the cement companies, we believe the statements of policy are identical.' " (R. 16096)

It will be observed that in this letter cited as evidence of conferences and agreements between respondents and dealers, none of which are specified, the National Federation does not attribute these policies to any combination among the cement manufacturers. It speaks of them as established by

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[14] App. IV, 2307.

[15] *Id.*, pp. 2313-22.

individual cement companies. They are identical because they follow in phraseology Article XI of the Code which was in turn an expression of the logical division of trade which had grown up over a period of years upon the basis of that service which the dealers could render and which they could not, a condition which continued to prevail in spite of the demands of the organized dealers during the N. R. A. Code period to handle all cement sales.

The findings then go on to cite communications between lumbermen's associations whose members were cement dealers as evidence of conspiracy between manufacturers based upon two meetings in Chicago in the Spring of 1935 attended by a number of dealers and representatives of five or six manufacturers. It is stated in the findings: "At these meetings dealer policies were decided upon".[16] The evidence of the dealers who actually attended these meetings and testified as Commission's witnesses, as well as that of the manufacturers who attended them is entirely ignored.[17] Runion, Secretary of the Nebraska Lumber Merchants' Association, called by the Commission, stated that at the first meeting there were fifty persons present of whom perhaps 15% were manufacturers.[18] He testified:

"By Trial Examiner Norwood:

Q. What was done? A. As I previously stated, our ambition in a meeting of that type was to secure as much as possible of the cement business in the areas in which dealers operated.

Q. Now, we are asking you what was accomplished towards those ends. A. We presented our

[16] Fdg. 17 (e), R. 16096-98.

[17] App. IV, 2334-51.

[18] App. IV, p. 2335.

proposition as to what we would like to have, which was all; we felt the dealers should participate in all of this business.

At that particular meeting, when I say progress was made, it was more our submitting what we would like to have. It was a general discussion of what our ambitions were along the lines of the selling of cement, and I could not say that progress was made, any definite progress was made at that particular meeting. We submitted our requests.

By Mr. Wooden:

Q. You mean that you submitted your requests for the consideration of the manufacturers? A. We submitted our requests to the manufacturers that we would like to participate in the sale of as much cement as we possibly could.

By Trial Examiner Norwood:

Q. Now, what did the manufacturers do about it? A. They took it under advisement at that meeting.

Q. Did you have any committees appointed, or anything like that? A. If there were any committees appointed at that time, I don't know. I was not serving on any of them.

Q. Any resolutions adopted? A. No, sir."[19]

The witness then identified an announcement dealing with the classification of business made by Universal Atlas on April 9, 1935 within a few weeks after this meeting and testified:

"Q. In what respect did it not represent what the dealers said they wanted at the meeting? A. We wanted all.

[19] App. IV, 2337.

Q. I see. A. And all of these sections, where they proposed to do certain things which exempts the dealer from participating in the sale of cement is not satisfactory to us."[20]

Hansen, Secretary of the Atlas Lumber Company, a dealer in Nebraska, also testified as a Commission witness that he was present in March and April at these meetings and his testimony was much to the same effect.[21]

All of the evidence of both dealers and manufacturers who attended these meetings and testified establishes without contradiction that some manufacturers met some dealers at their request to discuss with them their demands concerning the part the dealers were to play in the sale of cement and that after listening to them the manufacturers each went their own way and announced policies which were consistent with the established custom of the industry.

The evidence is fully set forth in App. IV, 2334-51.

"Method of Marketing Cement"

This is referred to in Fdg. 17 (e), R. 16097-98.

Scovel, an Assistant Vice-President of Universal Atlas, testified that he was the author of a mimeographed paper entitled "Method of Marketing Cement", in which he set forth in one column a list of buyers and classes of work and in an opposite column how to sell such buyers for such classes of work.[22] A copy of this appears at App. IV, 2357-2368. During the spring of 1935, copies of this paper appeared in the hands of salesmen of Universal Atlas and

[20] App. IV, 2338.

[21] *Id.*, pp. 2339-42.

[22] *Id.*, pp. 2352-2370.

they showed it to friends of theirs in the trade who asked for copies and received them. In all, eight copies, some of which varied in detail, appeared in the record, each derived from different sources.[23]

Following a meeting of the Southeastern Division of The Cement Institute on July 17, 1935 at Knoxville, at which 28 persons were present representing 13 respondents, Monday, the District Trustee, circularized the members of the district enclosing three copies of the "Method of Marketing Cement" and three copies of "Interpretations in Connection with Section 2 . . . on State Government Work" and then added, "these Plans and Interpretations were unanimously concurred in by all members of the Southeastern District and approved at the meeting held in Knoxville on Wednesday, July 17, 1935."[24] The findings referring to this meeting and this communication by Monday state: ". . . a method of marketing cement substantially identical with the method adopted in the Chicago meetings was agreed upon."[25] The minutes of this meeting are signed by Monday and they make no reference to "Methods of Marketing Cement" or any discussion of the classification of trade.[26]

McGovern of Hermitage, Elcock of Southern States, Dannelly of National, Bowen of Lehigh, Postelle of Alpha, Lewis of Volunteer, all of whom were present at that meeting, were examined about it and testified that there was no discussion of the subject during the meeting. However,

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[23] App. IV, 2370, 2374.

[24] Com. Ex. 547-4C; the evidence as to this incident is digested in App. IV, 2370-78.

[25] Fdg. 17 (e), R. 16097-98.

[26] Com. Ex. 547-3W-3Z.

after the meeting, while some of the men who had attended the meeting were still in the Farragut Hotel, a discussion developed concerning the manner of selling cement for drainage jobs and as to whether they were sold through dealers or direct and some man, unidentified, sat down and wrote out a statement as to how he was going to sell that kind of work and showed it to those with whom he had been arguing.[27] The minutes and the testimony of all the witnesses examined on the subject, challenge the accuracy of the statement of Monday quoted in the findings.

As noted above page 193, the firm evidence of the witnesses, including the dealers called by the Commission, establish that nothing was "adopted" in the Chicago meeting[28] and there is no substantial evidence in the record (aside from meetings held under NIRA) to support any finding that classification of work and customers was agreed upon at any meeting.

As evidence that "steps were taken to maintain uniform compliance with such policies" as to classification, the findings cite a letter by Rader dated April 24, 1935 while the NIRA was still being enforced, asking various members of the industry, a number of whom were trustees of the Institute, to receive Harold H. Chaffee, a representative of the National Federation of Builders Supplies Association, if he should call upon them in connection with alleged violations of sales policies announced by individual manufacturers.[29] Chaffee was the liaison man for the dealers appointed to watch the cement manufacturers to see that the dealers got as much of the cement trade as it was possible for them to

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[27] App. IV, 2372, *et seq.*

[28] *Id.*, 2334-51.

[29] Fdg. 17 (f), R. 16098.

get. Several manufacturers answered that they would be glad to meet Chaffee and cooperate with him. It does not appear upon whom, if anyone, Chaffee called or what he did when he did call, and we submit the fact that organized dealers sent a representative to call upon manufacturers individually to get as much of their business as possible is not evidence of conspiracy. The evidence concerning Chaffee appears at App. IV, 2529-33.

The representatives of thirty-one respondents specifically denied the existence of any agreement at any time between themselves and their competitors to sell cement according to an agreed classification of trade.[30]

Sales for Federal Relief Work.

These are referred to in Fdg. 18 (a), R. 16099. As usual the finding does not reflect the facts.

The evidence discloses that Federal Relief Work had taken over a field in building enterprise in cities and towns in which building material dealers had theretofore customarily provided the supplies. These dealers were the cement industry's largest customers and they, like others during the depression, were in need of the utmost business they could find. Individual manufacturers had to protect their dealers in their usual trade and particularly in the distribution of cement for city and town jobs, for which the dealers' local warehouseing and trucking facilities were of valuable service.[31]

Many sales were made directly to the Government for relief work and many purchases were made f. o. b. mill when

[30] App. IV, 2379-80, 2912-14.

[31] App. IV, 2385-2417.

land grant rates were available; and in areas where any one manufacturer was willing to sell to the Government, other manufacturers sooner or later generally came to the same policy or forfeited their possible share of such business.[32]

When the government appropriated $4,800,000,000 for expenditure by WPA, various industries not including the cement industry, organized the "Construction League" for the purpose of developing a program for government purchases.[33] In May 1935, the President of the Institute, appointed Reiter, Chairman of a committee of seven cement executives "to keep in close touch with developments in the purchasing end of material for this governmental work, and report back" to him.[34] The Procurement Division of the Treasury Department charged with the duty of supplying the WPA program with materials was placed in charge of Admiral Peoples and one Captain Collins was put in charge of cement purchases. Through his subordinate, Collins got in touch with counsel for the Institute and suggested that Reiter call upon him.

The findings state:

> "This Institute committee cooperated with E. J. Mehren and William Kinney of the Portland Cement Association and with L. I. MacQueen, H. S. Chaffee, Frank Carnahan, and other dealer representatives in presenting the agreed program for division of business to officials of the Procurement Division."[35]

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[32] The evidence as to emergency relief work sold direct appears at App. IV, 2430-33 and sets forth a number of bids between February 1934 and May 1939 which appear in the record of each of which anywhere from 1 to 11 manufacturers participated in the bidding.

[33] App. IV, 2387-88.

[34] *Id.*

[35] Fdg. 18 (b), R. 16100.

The findings then go on to cite a telegram from Mehren, President of the Portland Cement Association, to Reiter, of July 10, 1935, advising Reiter to bring to Washington copies of the original Code "and a draft of direct and dealer selling agreed on subsequently with dealers. Also copies declared policy of companies regarding direct and dealer selling".[36] The draft of direct and dealer selling "agreed on" can only refer to the proffered substitute for the sections of Article XI which the NRA had suspended from the Cement Code and which was not accepted by NRA and was never put into force.[37] There is no other draft in existence which fits the description. The findings then go on to quote from a letter of Reiter's, dated July 10th, directed to members of the Institute reporting on his meetings with Collins.[38]

The substance of this matter shows that cement manufacturers through their trade association and in response to questions by the government answered those questions and explained to the government the prevailing practice which had grown up through the years and which was intended to save to the regular dealers and customers of the manufacturers that business in the distribution of cement which by their investments in warehouses and trucks and their relation to the building supply industry in their respective vicinities they were best able to serve. Must the manufacturer now suffer the reproach of conspiracy because they answered the questions their government put to them, and explained that as wholesalers they shared the hope that the policies of the Government in administering emergency relief would not drive their retailers out of business?

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[36] R. 16100; See App. IV, 2398-2400.

[37] See argument, *supra*, pp. 189, 191.

[38] R. 16100-01; see App. IV, 2400-02.

Par. 18 (c) of the findings concludes with a quotation from a letter, dated August 28, 1935, by MacQueen, Secretary for the National Federation of Builders Supply Association, to his local associations, in which he extolls the work of his association in protecting the interest of dealers in the distribution of building supplies against a threat by the Government to purchase supplies direct and by so doing to foreclose to the dealers the relief which the Government was extending to mechanics and to manufacturers in the construction industries.[39] The letter does not mention cement. But perhaps the Commission, at a loss to substantiate its charges of a nationwide conspiracy, felt, as did Poo Bah under similar circumstances, that this letter would "lend artistic verisimilitude to an otherwise bold and unconvincing narrative".

D. The Commission Has Not Proved and Found the Conspiracy Charged in the Activities and Policies of Respondents Dealing With the Collection and Dissemination of Statistical Data and Production Policies of Respondents.[1]

1. Institute and Other Statistical Data.

The Institute carried on a statistical service from the date of its organization in 1929 until May 12, 1931[2] when membership dropped to 20 companies and the statistical data became too incomplete to be of any use to anybody. During this period members contributed the following data each month:

[39] R. 16102; see App. IV, 2523-24.

[1] Statement of Points, Nos. 6 and 25, R. 16236-37, 16268-71.

[2] App. III, 1932-35.

i. monthly production of clinker and cement.

ii. monthly shipments of cement.

iii. stocks of clinker and cement on hand.

The Institute tabulated this data by Bureau of Mines Districts to show totals and the individual figures submitted by each member and sent it to each member monthly without comment. The Institute did nothing more.

This statistical service was patterned after the statistical service of the Cement Manufacturers Protective Association which was approved by this Court in the first *Cement* case. The words of Mr. Justice Stone in his opinion in that case apply as well to the Institute service when he says:

> "Each member of the Association, . . . sends to the Association a monthly statement of its production of clinker and ground cement, shipments and stock on hand for the past month and for the corresponding periods of the previous year. These were compiled and distributed to members without any change or comment. In addition, semi-monthly statements of shipments were also received and likewise distributed. Each member of the Association was thus given full information as to the available supply of cement and by whom it was held" (268 U. S. 588 at 600 (1925)).

The Institute service that had been abandoned in May, 1931, was resumed in September, 1933, following the Institute's revival at the time of N. R. A., and was continuing on the date of the complaint herein. The revised service was substantially the same as the old service.[3]

[3] App. III, 1935-37.

Each member contributed the following data each month:

i. Clinker on hand at the end of the previous month and at the end of the current month and clinker produced and ground during the current month.

ii. Cement on hand at the end of the previous month and at the end of the current month and cement produced and shipped during the current month.

The Institute tabulated this data in the same way that the earlier data was tabulated and sent it to each member monthly without comment.[4]

In addition the Institute statistician prepared and sent to each member the following four reports:[5]

1. A monthly report showing by Bureau of Mines districts the total clinker capacity of mills in each district and the percentage of capacity utilized in clinker production and cement shipments, and the stock of clinker and cement on hand. No individual company figures were shown. The Institute statistician made up his own estimates of plant capacity for use in this report from the monthly reports of clinker production made by the members.[6]

2. A monthly report showing by Bureau of Mines districts the average daily supply of cement on hand, as of the last day of the current month, the last day of the

[4] It was furnished to non-members of the Institute upon payment of a small fee. App. III, 1944.

[5] These reports were furnished to non-members of the Institute upon payment of a small fee and to federal and state agencies upon request and without charge (*Id.*).

[6] App. III, 1937, 1939, 1941-43.

eleven preceding months and the last day of each of the corresponding months in the preceding year. Again, no individual company figures were shown. This data was compiled from the monthly reports of stocks on hand made by members.[7]

3. A quarterly report showing by Bureau of Mines districts the average factory value of cement produced and shipped in the United States from the years 1920 to the date of the report based on statistics furnished by the Bureau of Mines.[8]

4. A report showing for each state in each Bureau of Mines district east of the Rockies the dollar value of construction contracts awarded during the current year and during the three preceding years through the corresponding months as compiled by F. W. Dodge Corporation and an estimate by the Institute statistician based upon these contract awards of the probable percentage increase or decrease of cement consumption during the current year in comparison with a like period in the prior year. This last report on dollar value of contracts awarded is the only report concerning estimates of future probabilities and was based entirely on data arising outside the cement industry.[9]

All of these four reports, above described, sent out by the Institute show only figures in totals or averages and in none of them is the identity of any company revealed. The only price information contained in any of them or in any other Institute statistical data is the quarterly report of the

[7] App. III, 1937-39.
[8] *Id.*, 1938-39.
[9] *Id.*, 1938-40.

United States Bureau of Mines figures on the average factory value of cement. All were issued without comment and there is not a scrap of evidence of any discussion of these reports or any other statistical data at Institute meetings or any other meetings.

Mallory, who was then the Institute statistician, in submitting to Reiter, General Manager of the Institute, on April 2, 1936, a set of reports issued by the statistical office of the Institute wrote:

> "I have no knowledge as to the actual value the reports have to the companies. However, they are issued in the belief that they help the companies by eliminating their suspicions in connection with what their competitors are producing and shipping since they get the facts, and the reports also bring them information about current conditions in the construction industry."[10]

The testimony of executives of those companies who were examined on the point made clear that these companies, if they used the statistics at all, used them to keep themselves generally informed as to the amount of production and shipment in the territory in which they were engaged in selling; that generally they valued the Institute's statistics only because they brought information to light as to past transactions sixty to ninety days sooner than the same information or more complete information could be had from regular publication of data by the Bureau of Mines; and that in letting them know how sales were running in their territory, they could check up on their salesmen.[11]

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[10] Fdg. 15 (i), R. 16080; *Id.*, 1940-41.

[11] App. III, 1962-78. For denials of agreement to limit production or divide business see App. III, 1963.

Such is the uncontradicted testimony of cement executives as to the use made of the statistics.

The legality of the collection and dissemination of data of this sort is well settled. In *Maple Flooring Manufacturers Assn. et al* v. *United States*, 268 U. S. 563 (1925) Mr. Justice Stone said with respect to a statistical service of far greater scope than that of the Institute:

> "We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce." (p. 586)

The foregoing statement as to the statistical services of the Institute is in no way contradicted in the Commission's findings. On the contrary, the findings in familiar fashion leave the reader with no clear and simple statement as to just what data the Institute did collect and disseminate.

At one point (Fdg. 15 (i)) reference is made to the objections by two companies, Marquette and Ash Grove, to the revelation of their individual figures of production and shipments.[12] The findings characteristically ignore the uncontradicted evidence that their objections were acted

[12] R. 16080-81.

upon at once and thereafter their individual figures were not revealed.[13]

2. *Production Policies of Respondents.*

The Commission's effort to show in its findings some connection between the statistical data distributed by the Institute and restriction of production by the respondents is answered by the evidence used by the Commission itself.

First, the Commission points to more of the old evidence. This time it refers to meetings of the defunct Association of American Portland Cement Manufacturers in 1903, 1904, 1910, and 1911 (Fdg. 15 (b), R. 16071-72). We say again that this is not competent proof of conspiracy among the respondents before this Court.[1]

Second, the Commission points to the work of W. S. Mallory (Fdg. 15 (c) (d), (e), R. 16073-74) who conducted a statistical service of his own between 1926 and 1933 which he sold to between 20 and 40 cement companies. For this service Mallory derived his data from reports issued by the Bureau of Mines.[2] The findings then refer to a letter by W. J. Jennings, Sales Manager of Southwestern, Ohio, addressed to his superior and reporting upon a meeting of the Institute in Chicago. It refers presumably to the organization meeting of the Chicago division on January 7, 1930.[3] Part of this letter is quoted in the findings (Fdg. 15 (d), R. 16073-74). The letter states that among other things Mallory, who is incorrectly described as the

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[13] App. III, 1944-55.

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[1] See Argument, pp. 26-30 above.

[2] App. III, 1935, 1985-94.

[3] *Id.*, p. 1990-92.

Institute statistician,[4] had "developed the amount of cement available for each plant throughout the U. S." The record does not show that Mallory ever did any such thing and Mallory's testimony makes it clear that he never did,[5] but this may be Jennings' careless way of saying that Mallory had developed capacity ratings for the various plants for use in his own subscription service. Jennings then goes on to say:

> "It is the idea of the Cement Institute to get all the member companies to reduce their output to 70% of the capacities allowed them by Mallory, and of course the price would then automatically go back to what it originally was, and some are talking of 40¢ over the present price. This operation on 70% capacity would continue until such time as the country was able to consume more or stocks on hand are reduced to zero." (App. III, 1992; Fdg. 15 (d), R. 16074)

The findings characteristically omit to state that there is no evidence in the record of any such purpose on the part of the Institute and that there is no evidence of any agreement or understanding to curtail production.

Nevertheless in an attempt to support this statement of Jennings, the findings (Par. 15 (e), R. 16074) state that according to Mallory's figures the average percentage of production to capacity for 1930 did not exceed 70% in any Bureau of Mines district, the closest being 69.9% in eastern Mo., Iowa, Minn. and S. D.; 69.9% in Texas and 69.8% in western Mo., Neb., Kan., Okla. and Ark. with other dis-

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[4] Fdg. 15 (c) (R. 16073) correctly finds that Mallory was not employed by the Institute until September, 1933, nearly four years later.

[5] R. 5465-84, 5494-5571.

tricts varying considerably but being substantially below 70%. These are average figures for these districts. The findings cite Com. Ex. 2895 A-D for this.[6]

Com. Ex. 2895 A-D tells a different story when we turn from the average figures for the districts to the figures of individual companies shown on it. There is no uniformity of percentage of production to capacity. Individual company figures for the districts cited in the findings show:

Eastern Mo., Iowa, Minn. and S. D.—a range from 56.7% to 96.7%.[7]

Texas—a range from 55% to 80.5%.[8]

Western Mo., Neb., Kan., Okla. and Ark.—a range from 44.7% to 87%.[9]

For other districts they are as follows:

Eastern Pa., N. J., Md., N. Y. and Me.—a range from 44% to 91.8%.[10]

Ohio, western Pa., and W. Va.—a range from 39.7% to 104.7%[11]

Mich.—a range from 38.6% to 86.5%.[12]

Wis., Ill., Ind. and Ky.—a range from 48.1% to 91.7%.[13]

Va., Tenn., Ala., Geo., Fla. and La.—a range from 17.4% to 88.5%.[14]

These figures end once and for all any claim of conspiracy in 1930 or at any time between 1925 and 1933.

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[6] Com. Ex. 2895 A-D is printed in App. III, pp. 2001-08.

[7] App. III, 2005.

[8] *Id.*, 2006.

[9] *Id.*

[10] *Id.*, 2001.

[11] *Id.*, 2002.

[12] *Id.*, 2003.

[13] *Id.*

[14] *Id.*, 2004.

Similar figures appear in Com. Ex. 2895 for all those years. It is no wonder that the Commission concludes this finding with the halting statement that:

> "It is not practicable to determine to what extent this resulted from cooperation among respondents or from the effects of general economic conditions in 1930." (Fdg. Par. 15 (e), R. 16074)

Third, the findings point to a letter dated November 15, 1933 from Mallory, then the Institute statistician, to one respondent (Fdg. 15 (f), R. 16075-76) setting forth a table showing a percentage of shipments in eight Bureau of Mines districts in 1933 which, according to his own notions of an equitable distribution of business based upon plant capacity, were "out of balance" by substantial amounts. Thus, it appears from the findings themselves that the industry left Mallory's notions just where it found them. And when we turn again to Com. Ex. 2895 and examine the percentage of shipments of individual companies to their clinker capacities for 1933 we find a wide range as between different companies. Thus, in Districts 1 and 2, which Mallory mentioned specifically in his letter, the percentage of the highest company was 28.5% and of the lowest 6.7% of clinker capacity. The exhibit shows even more striking ranges between companies in other districts.[15]

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[15] The following figures are taken from Com. Ex. 2895 reproduced in App. III, 2001-08:

	Highest %	Lowest %
District 3	63.6	8.9
" 4	35.5	12.3
" 5	61.1	13.4
" 6	35.9	12.5
" 7	83.0	18.1
" 8	40.6	17.1
" 9	48.0	20.8

Once again the Commission's effort is destroyed by its own evidence.

Fourth, the findings[16] quote an unsigned, undated and unaddressed memorandum stated to be prepared in 1931 or early 1932 by Diamond and circulated by it to competitors:

> "In the year 1930, according to Mr. Mallory's yardstick, we shipped only 4500 barrels in excess to our fair share of the business, which should be a clear indication that we have not abused our position."

The findings, however, omit the paragraph just preceding, which reads:

> "Our competitors and especially those who have entered the field in recent years have not hesitated to use every possible advantage at hand in marketing their product and we fail to see why, as an old established company, we are not entitled to the advantage of our location."[17]

Thus, it appears that Diamond's real grievance was that its competitors had used every possible advantage at hand in competition with it at a moment when it would have preferred to have been spared this pressure. This is not evidence of agreement to limit competition, but is a complaint about excruciating competition.

Fifth, as a last resort the Commission turns to the N. R. A. Code for the Cement Industry and the provision of Article VI granting to the Institute authority to formulate a plan for the equitable allocation of available business for

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[16] Fdg. 15 (f), R. 16075.

[17] App. III, 1993-94.

submission to N. R. A. (Fdg. 15 (g) (h) R. 16076-78) Though several efforts were made under this provision of the Code to devise a plan, none was ever approved by the industry.[18] We have already argued that this N. R. A. evidence should be stricken from the findings.[19] The findings, however, set forth a table (Fdg. 15 (h), R. 16078) synthesized from tables prepared by Mallory at the request of Commission Counsel,[20] tabulating clinker production, cement production and shipments during 1936, 1937, and 1938 for each company grouped in districts and also broken down by plants. The synthetic table in the findings deals only with the data for Districts 1 and 2 and its purpose is to show that in 1936, 1937, and 1938 the business done by the chain mills approximated 62% and by the individual mills 38% which accorded with data referred to by Brobston, chairman of one of the committees to discover a plan for the allocation of business, and which fact formed the basis of his proposed plan for those districts. The Commission does not make any finding that this is a matter of plan or prearrangement. The reason is plain when we examine the evidence.

Com. Ex. 3203 is Mallory's table from which the syntheses in the findings was made (figures are in thousands of barrels and a variation of 1/10 of 1% represents over 25,000 barrels). An examination of the figures of individual companies in Com. Ex. 3203 destroys the table in the findings completely. Com. Ex. 3203 discloses that the high and low of the annual shipments of the several companies in 1936, 1937, and 1938 do not occur in the same year for all the com-

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[18] App. III, 2126-51; *supra*, pp. 34-35.

[19] See Argument, pp. 31-41, *supra*.

[20] App. III, 2009 to 2011.

panies as they would if there existed any agreed plan for the control of shipments. On the other hand, the variation of percentages of the high year over the low were 6.1% for one company, 71.2% for another, 45.6% for another, 4% for another, 27.5% for another, etc.[21] Out of 19 companies only two varied equally.

We submit that the evidence pointed to by the Commission itself in its findings—the basic data of actual shipments showing what individual mills did from 1925 through 1933 (Com. Ex. 2895) and from 1936 through 1938 (Com. Ex. 3203)—supports the contention of respondents that there has never been a time in the history of this industry in which the manufacturers have made any kind of an agreement to curtail production or to operate their companies to share available business or have been dominated by "a philosophy of maintaining a static condition in the production of cement to the extent of preserving the individual manufacturer's proportion of the total business and acceptance of the theory of dividing available business among producers in accordance with some predetermined formula" (Fdg. 15 (a), R. 16071).

E. The Commission Has Not Proved and Found the Conspiracy Charged in the Activities and Policies of Respondents Dealing With Foreign Cement.[1]

There is no finding that the actions or policies of any respondent respecting foreign cement had any connection

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[21] This breakdown and the percentage of change in shipments by each company is set forth at App. III, 2011.

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[1] Statement of Points Nos. 6 and 29, R. 16236-37, 16274-76. The evidence of practices and policies relating to foreign cement is set out in App. IV, 2623 to 2672.

with the maintenance of a multiple basing point system of pricing, nor could there be. Neither is there a finding that all of the respondents took any action or had any policy respecting foreign cement. The findings on the subject are plainly limited to "corporate respondents who sell cement in some of the larger seaport cities."[2] The evidence shows that thirty respondents sell cement in competition with foreign cement and that thirty-four respondents do not.[3] The evidence further shows that of the thirty who do, nine have had no fixed policy or practice in competing with foreign cement.[4] The Commission's findings in Par. 19, therefore, notwithstanding the innuendo that these findings are of general application, and Paragraph 2 (o) of the Order (R. 16136-37) based thereon, can properly affect only twenty-one of the seventy-four respondents.

The so-called "boycott" of dealers handling foreign cement in New York and Boston was flatly denied by testimony of executives of the companies concerned.[5] This direct evidence dissipates whatever force there may have been in the imaginative conclusions of the foreign cement dealers —no matter how honestly conceived —that they were victims of some agreed plan by the local American producers. The refusals to sell which occurred were, as the evidence shows, clearly the outcome of individual self-protection— the adoption by most, but not all of the companies selling in those markets, one-by-one, of a policy initiated by Lone Star which seemed to work.[6] It was a short lived attempt

[2] Fdg. 19 (a), R. 16102.

[3] App. IV, 2623-25. The record is silent as to the remaining ten corporate respondents.

[4] App. IV, 2635.

[5] App. IV, 2647-48, 2652-55, 2657, 2663-65.

[6] *Id.*, pp. 2647-65.

to counteract the impact of the foreign products produced by cheap labor, often under government subsidy, which travelled from Europe to the eastern seaboard at an ocean-going rate which was as low per barrel as the rail rate from the Lehigh Valley to New York.[7] By the Commission's own evidence the refusal to sell by at least one company lasted as little as two or three weeks.[8] The Institute had nothing to do with any of these activities[9] and at no time during that period were these dealers unable to obtain domestic cement.[10]

Respondents do not dispute that prices in seaboard areas (sometimes called arbitrary prices) have often been lower than inland prices. There is no evidence and no finding that this came about by agreement. The evidence is that these lower prices resulted in very low nets at the domestic mills, often less than out-of-pocket costs of the domestic manufacturers.[11] Once lower prices were initiated by any seller, all other sellers had to meet the lower prices or abandon the market.

None of the evidence on this subject has any bearing on the charge which underlies the findings and the order that the seventy-four respondents have a conspiracy to use and maintain a multiple basing point system of pricing. The whole of Par. 19 of the findings must accordingly be disregarded in the search for the nationwide conspiracy charged.

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[7] R. 2886, 10371; Com. Ex. 516 B, Resp. Ex. 2400-B.

[8] App. IV, 2643-44.

[9] *Id.*, 2665.

[10] *Id.*, 2638, 2646, 2657, 2662, 2664, 2665.

[11] R. 10009, 7944-45, 8328, 8394-95, 3127.

F. The Commission Has Not Proved and Found the Conspiracy Charged in the Industry's Public Relations Activities.

The public relations activity of respondents is labelled as a "propaganda campaign" in the Commission's brief (p. 94, fn. 57). The findings on the subject in Par. 21 (R. 16108-16122) are referred to also at pages 22, 48, 49 and 60 of the brief. Notwithstanding the findings devote fifteen pages to this subject, the finding respecting public relations activity is simply this:

> "As a result of the protests and charges against the cement industry and its members [because of increased prices and uniform prices] the Institute and its members engaged in a concerted course of action directed toward allaying the criticism and seeking to convince the public that there was no collusion among cement manufacturers." (R. 16108)

Respondents have not challenged that finding. Of course, the public relations committee activities constituted "concerted action" and admittedly the purpose was as stated. The rest of paragraph 21 of the findings is a recital of evidence, not the whole evidence, but the customary piecemeal extracts.[1] But whatever it is, it doesn't constitute findings of anything.

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[1] The record—the whole evidence—on the subject of the Public Relations program of the Institute is set out in App. III, 2026-56. This includes verbatim and in context, the excerpts recited in the findings. The Marketing Research Committee, the activities of which are intermingled in the findings with those of the Public Relations Committee, was a separate enterprise. The evidence is set out in App. III, 2056-98. The reason for the attempted arrangement to have the Commission collaborate in the proposed study of the industry is plain from the letter of the Commission's Chairman which is in evidence (App. III, 2065-66).

V. The differences in delivered prices or the variances in mill nets of cement producers do not constitute price discrimination in violation of Section 2 of the Clayton Act as amended.[1]

Count II of the complaint Pars. 1-5, 6, 8 and 9, R. 218, 223-224, 241, 249) charges that the combination charged in Count I of the complaint as being violative of Section 5 of the Federal Trade Commission Act results in price discrimination in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Count II of the complaint is so construed by the Commission in its findings (See Par. 24 (a), R. 16127) and the order of the Commission is directed only against the doing of the prohibited acts by agreement and thus is issued under Section 5 of the Federal Trade Commission Act. If this Court concludes, as we contend above, that there has been neither finding nor proof of the combination charged under Count I of the complaint then the findings fall and the order of the Commission must be set aside and the charge under Count II of the complaint falls as well.

That being the case, we argue the price discrimination point because, as the record now stands, these respondents are confronted with findings that the pricing practices of base mills and non-base mills are discriminatory (see Fdg. 23 (a), (b), 24 and 25, R. 16124-31), and also because, if this order is sustained and these respondents acting individually continue to market their cement at delivered prices and to meet competition by absorbing freight, they will again be exposed to a charge of conspiracy growing out of the mere use of this marketing method.

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[1] Statement of Points Nos. 33-37, R. 16278-79.

The Commission in its brief makes no statement as to the relevance of the findings on this subject and of the issues raised in its brief under the Clayton Act as amended.

Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act of June 19, 1936 [49 Stat. 1526; 15 U. S. C. A. Sec. 13, as amended], so far as here material, provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered;"

Section 2(b) provides:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * * the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case

thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor, * * *."

A. The Word "Price" in the Clayton Act as Amended Means What the Buyer Pays.

The Commission's charge under Count II of the complaint and its findings on that charge[1] are based on the premise that the "true price" of cement is the amount realized at the mill after deduction of transportation costs and that discrimination in price within the meaning of Section 2 of the Clayton Act, as amended, is to be measured by the variations in mill nets resulting from sales made to customers at different locations.

We confidently submit that that theory is untenable. Our position is that the word "price" in the Clayton Act, as amended, means what the buyer pays for the cement. The proviso to Section 2(a) of the Act in permitting differentials that make only due allowance for differences in the cost of delivery recognizes that discrimination may exist in delivered prices, that is, in prices that include cost of delivery to the buyer. Necessarily in all such cases the discrimination in price, if any, must be measured in terms of the delivered price paid by the buyer or otherwise the proviso becomes meaningless. The presence or absence of due allowance for differences in the cost of delivery cannot be measured in terms of the amount realized after deduction of delivery cost. It can only be measured by treating price as the delivered price paid by the buyer and then ascertaining whether that price reflects due allowance for

[1] Complaint, Count II, pars. 6, 8, R. 223-24; 241; Fdgs. 23(a)(b), 24 and 25, R. 16124-31.

any differences in the cost of delivery to the buyer. And even this inquiry may not be made if the delivered price to buyers is the same at all points of delivery for then, as this Court pointed out in the *Staley* case,[2] there is no discrimination in price. Necessarily this must mean that there is no discrimination in the delivered price and that this Court rejected the theory now put forward by the Commission, for it is obvious that when a seller quotes a uniform delivered price to all buyers wherever located, his net realization after deduction of different delivery costs to different delivery points will be different.

Further, this Court in the *Corn Products*[3] case made it plain that the Clayton Act, as amended, does not outlaw delivered prices. This Court there referred to the rejection by Congress of a provision of the Robinson-Patman bill which in its practical effect would have required that the price of all commodities be computed "on a f.o.b. factory basis".

This, the Court added, "would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. * * * Indeed, the provision would have prohibited such a multiple basing point system as that in *Cement Manufacturers Protective Assn.* v. *United States, supra* * * *" (324 U. S. at 727). Referring again to the rejection by Congress of this drastic amendment, this Court concluded:

> "We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price

[2] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945) at 757.

[3] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945).

systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of §2(a), as enacted, and its more restricted prohibitions of discriminations in *delivered prices.*" (324 U. S. at 737; italics ours)

The Commission's theory of price discrimination reflected in its findings, even though it be assumed that these are findings of fact, which we deny, must be rejected because of the application of an erroneous standard of law. *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. (2d) 620, 624-625 (C. C. A. 6th, 1939) cert. denied, 308 U. S. 557 (1939).[4]

The Commission in its brief, pages 106-111, takes the alternative position that even if our position is correct, there are still discriminations in the delivered prices of non-base mills and in the delivered prices of base mills when they quote delivered prices based on rail freight and make delivery at a lower water or truck rate. These practices are unimportant in this industry and we deal with them later. We turn now to the important issue as to the legality of the action of a base mill when, in quoting a lower price in good faith to meet an equally low price of a competitor, it absorbs freight in doing so.

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[4] The Court, in setting aside the Commission's order, said:

"the findings and conclusions of the Commission that the discrimination in price was not on account of quantity, were all based upon the Commission's interpretation of the law. This permeated all of its discussion and controlled its evidentiary findings and its ultimate conclusions * * *." (p. 625)

B. The Law as to Base and Non-Base Mills.

There is no issue as to the legality of the pricing policy of a base mill when it quotes a delivered price by adding freight or other transportation cost to a figure at the mill.[1] This is a simple, straightforward method of quoting a delivered price. It is, also, the much maligned formula. It is hard to know what other method this base mill might pursue.

There is a sharp issue when this same base mill attempts to sell cement to purchasers outside its freight advantage area and in doing so absorbs freight in good faith to meet an equally low price of a competitor.[2] The lower court pointed out in its opinion that the Commission went so far as to state in its brief below that "this case will have been litigated in vain if petitioners' [respondents'] views prevail on this subject" (R. 16769).

The sharpness of this issue is reflected in the effort of the Commission to disavow that the effect of its order will be to bar the simple competitive act of a mill quoting a lower price in good faith to meet an equally low price of a competitor and in absorbing freight if necessary to quote the lower price. This competitive act is recognized under the Clayton Act, as amended, and what a mill may do under that Act it may do always and at any time.

The Commission's disavowal is expressed in the following extraordinary words in its brief, page 122:

> "The order therefore leaves each respondent free —provided he acts individually and with that *variability in action respecting particular competitive situations which is characteristic of genuine com-*

[1] Com. Br., p. 112.

[2] Com. Br., pp. 112-117.

petitive endeavor and a free market—to absorb freight in order to meet a competitor's low price or to sell at a delivered price."

The Clayton Act imposes no such extraordinary qualifications on the acts of competitors as are contained in the italicized words. We will have more to say about this in our argument respecting the order at pages 244 to 246 below.

The lower court properly applied the decisions of this Court in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945) and *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U. S. 746 (1945) and held that freight absorption was not held to be discriminatory in those decisions, that the question was expressly left open in the *Corn Products* case and that the two decisions taken together indicated an approval of the practice (R. 16795-96, 16814).

The facts as to a base mill raise the following questions:

1. Is there a discrimination (a difference) in price between different purchasers?

2. If so, does this discrimination substantially lessen competition or tend to create a monopoly "in any line of commerce," i.e., the line of commerce in which the purchaser or the seller is engaged?

3. If so, do the differentials involved make only due allowance for differences in the cost of delivery?

4. If not, then has the prima facie case made by an affirmative answer to questions (1) and (2) and a negative answer to question (3) been rebutted by a showing

that the lower price "was made in good faith to meet an equally low price of a competitor."

1. There is a difference in price, a discrimination, between different purchasers at different destinations when a base mill adds to a constant mill figure, or maximum mill net, freight or other transportation cost differing in amounts to the purchasers at different destinations. The purchasers pay different prices for cement because it costs different amounts to get the cement to them at the points where they want it. Exactly the same differences in delivered prices occur when a base mill absorbs freight or receives a lower mill net in order to meet a lower price at a given destination.

2. But it is clear that the difference in price to purchasers at different destinations does not produce the proscribed effect on competition in the line of commerce in which the seller is engaged.

We have never argued, as the Commission states in its brief, pages 117-120, that Section 2 of the Clayton Act, as amended, has application *only* if there is a showing of a substantial lessening of competition between buyers.

As to the line of commerce in which the seller is engaged, the Commission argues in the findings, Par. 25 (R. 16130-31):

> "that the effect of such discrimination in price has been and may be substantially to lessen competition and tend to create a monopoly in the sale and distribution of cement, and has been and may be to injure, destroy, and prevent competition with respondents who grant and exact such discriminations;"

This is an extraordinary argument. Precisely the opposite is true. Every time a base mill sacrifices some part of its mill net in order to market its product in a territory

nearer freightwise to some other mill, it is actively promoting competition. It is making a sacrifice to stay in a market and sell its cement. If it consistently refused to make this sacrifice and consistently stayed in its own most favorable territory, then there might be a basis for an argument such as the Commission makes. The facts are precisely the opposite. Judge Major in his opinion below dwelt on this important point at great length.[3]

The Commission in its brief, page 120, argues that it is beyond question that the finding quoted above is supported by evidence. We challenged that finding in the court below and we challenge it here.[4]

This finding is made in almost the precise words of the statute and as such is entitled to little weight. If there had been a finding of combination to employ *any* marketing method then the Clayton Act charge is immaterial and there would be no need for the Commission to rely on the finding quoted above. The finding is significant only in so far as it deals with the individual policies of respondents and the charge of individual price discrimination under the Clayton Act. So considered it has no support in the evidence for the reasons stated above which are developed at greater length at pages 91 to 99 above and for the reasons stated at great length by Judge Major in his opinion below.[5]

3. The differences in price make only due allowance for differences in the cost of delivery. This is plainly so when a base mill simply adds freight to its mill figure and quotes the resultant figure as its price at the destination. With different freight rates to different destinations the resultant

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[3] R. 16790-97, 16813-14.

[4] Statement of Points, No. 35, R. 16279.

[5] R. 16790-97, 16813-14.

delivered prices will be different and in each case they will reflect *exactly* the differences in the cost of delivery. This is more than the statute requires.

The Commission, however, claims that when a base mill absorbs some freight by adjusting its mill net in order to compete in territory closer freightwise to another mill it is not making due allowance for differences in the cost of delivery but is merely making allowance for the cost of delivery from the other base mill. There is no question here of so called "phantom freight" or "freight profit" as there was in the *Corn Products* and *Staley* cases. Quite the reverse is true. The mill that must absorb freight is at a disadvantage. It must make a sacrifice in order to be able to sell in the market at all. The sacrifice that it makes reflects the difference between its actual freight cost and the actual freight cost to get the cement to the buyer from the nearest mill freightwise and it also reflects any difference between the price bases of the competing mills and its own. Surely this is the making of due allowance for differences in delivery cost either from the shipper's mill or a mill of a competitor nearer freightwise. The latter situation involves the right to meet in good faith the lower price of a competitor as provided by the statute and this is discussed below. The act of freight absorption is the making of an allowance that will place the buyer in an equal position in relation to his sources of supply and thus avoid the very differences in delivered prices that the statute is directed against, that is, those that ignore differences in delivery cost and thus hurt the buyer.

4. But even if we assume that a *prima facie* case of price discrimination has been made, then the base mill that absorbs freight has affirmatively rebutted it by showing that

its lower price was made in good faith to meet an equally low price of a competitor. We are not, of course, concerned with the base mill that makes its delivered prices by simply adding freight to its constant mill figure. There is no possible *prima facie* case against it and there is nothing to rebut. The base mill that absorbs some freight, however, is making a lower delivered price than it would make if it simply added freight to a constant mill figure. And it makes this price "to meet an equally low price of a competitor," within the plain words of the statute.

On this point the Commission has found that through common customers and through salesmen in the field information concerning any price change reaches the sellers in the area "almost immediately" (Par. 9 (e), R. 16029). Furthermore, the evidence shows that this occurs not merely at the time of a price change but it happens daily as a regular practice of the salesmen. In evidence are hundreds of price quotations by competitors picked up in the field as a regular practice by salesmen and sent into their home offices. Hundreds of others were offered and rejected by the Trial Examiner as cumulative.[6] In this evidence the respondents have met as fully as they were permitted the burden of showing that the base mill that lowers its delivered price by absorbing some freight has done this to meet an equally low price of a competitor, as shown by almost immediate knowledge of price quotations picked up in the field.

Has the freight absorbing mill done this "in good faith"? What is there about this that reflects in any way upon its "good faith"? The lower court, referring to the Commission's hypothetical illustration in Par. 7 (g) and 23 (a) of the findings (R. 15991, 16124) said:

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[6] App. I, 220-227.

> "• • • we cannot see the slightest reason for imputing to either base Mill A or C any other than good faith in absorbing such freight as was necessary in order to meet the price of the other. It was imperative that each of these mills do so if they were to sell in the territory where the other had a freight advantage and, as already pointed out, neither of them could have prevented the other from so doing." (R. 16795)

The base mill that is absorbing freight is simply doing a normal competitive act. Nothing that is said by this Court in the *Staley* case condemns this. On the contrary, it is distinguished in words that exactly describe what the freight absorbing mill does, as follows:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."[7]

Nor is the freight absorbing mill here meeting a price that is in any way discriminatory, as in the *Staley* case, as the Commission argues in its brief page 115. In this situation it is meeting a price established by a competitor who added *actual* freight to a constant mill figure.

The freight absorbing mill has also, within the exact language of the opinion in the *Staley* case, established its own "non-discriminatory price system, and then reduced their price when necessary to meet competition."[8] At another point, referring to the statutory test of a "lower price • • •

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[7] 324 U. S. 746 at 757.

[8] 324 U. S. 746, at pp. 754-755.

in good faith to meet an equally low price of a competitor" this Court said:

> "This test presupposes that the person charged with violating the Act would, by his normal, nondiscriminatory pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price."[9]

The evidence is abundant and uncontradicted in this record that as new and old mills in this industry decided to establish themselves as base mills and quote delivered prices they asserted price leadership and reduced prices to keep more distant mills out and as mills grew in number and competition became more intense those same mills were required to absorb freight to meet the delivered prices of competitors. As of November 29, 1940, as we have already seen, there were 96 base mills, 15 base packing plants, and 16 additional mills within 50 miles of base mills in the area east of the Pacific Coast.[10] There was

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[9] 324 U. S. 746 at p. 754.

[10] See pp. 86-89, *supra*. The findings, Par. 7 (d), (R. 15989) find that:

> "There are also basing points common to a number of different mills; that is, several mills may be located in an area from which the freight rates to other locations are the same regardless of where within the given area a mill is located."

Respondents accept this finding. Included in the number of 96 base mills mentioned in the text are many mills that fall within the language of the finding quoted above (see App. I, 425-27).

As to the 16 mills within 50 miles of base mills, their situation in relation to the base mill to which they are contiguous is such as to, in the words of Chief Justice Stone in the *Corn Products* case, "result in but trivial freight variances," 324 U. S. 726 at 735. Chief Justice Stone was referring there to the fact that in the case of

thus "a basing point at or near each point of production"[11] and the individual competitive situation of each of these mills and packing plants meets fully the requirement of good faith in its individual pricing methods.

The Commission ignores the foregoing when it argues in the findings, Par. 24 (d) (R. 16129-30), that the use of "The multiple basing-point delivered-price system" by respondents precludes the defense of good faith. If this means that multiple basing point selling is illegal *per se*, then the *Corn Products* case is a complete answer. We refer to the words of the Chief Justice quoted on pages 220-221 above. In its brief the Commission argues, pages 113-114, that prices quoted pursuant to agreement cannot be made in good faith under the Clayton Act. We agree. We point out again that if there had been a finding of combination to employ *any* marketing method then the issues raised under the Clayton Act are immaterial.

Turning now to the Commission's argument that a base mill engages in price discrimination when a delivered price is computed on a rail freight rate but actual delivery is made by water or truck at a different rate,[12] we note that the Commission magnifies evidence dismissed by the court below as irrelevant.[13] If the water or truck rate is the same

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Maple Flooring Manufacturers Association et al. v. *United States*, 268 U. S. 563 (1925) the single basing point at Cadillac, Michigan, was so close to most of the points of production in the Michigan, Wisconsin and Minnesota areas as to result in these "trivial freight variances". The facts in this record fully support the same result here, see footnote 2, *supra*, p. 87.

[11] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 at 735 (1945).

[12] Brief, pp. 106-107, 108-109.

[13] Judge Major describes these practises as "two minor exceptions" to the statement that base mills quote delivered prices from the point

as the rail rate, as it sometimes is,[14] then the argument falls. If the water or truck rate is higher than the rail rate, as it sometimes is,[15] then the base mill must absorb the difference if it is to quote a price that will be competitive and enable it to stay in that market, and the argument falls for the same reasons that apply to any other acts of freight absorption. If the water or truck rate is lower than the rail rate, as it sometimes is,[16] then the argument stands if all of the other requirements of the Clayton Act are met.

As to water transportation we challenge the two brief references to this subject in the findings.[17]

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of actual shipment. He refers to "a small number" of respondents who quote a delivered price on the rail rate but ship at a lesser water rate and to "certain of the respondents" who deliver by truck but charge a higher rail rate (R. 16798). At a later point in his opinion Judge Major describes this practice as not relevant to the issues for decision and suggests that the Commission has authority to proceed against those whose methods and practices are illegal but that the existence of these practices on the part of a few respondents affords no justification for proceeding indiscriminately against all members of the industry, good and bad alike (R. 16814-15).

[14] As to water rates, see App. III, 1710, 1716, 1721; as to truck rates see App. III, 1440-42, 1449. See also Respondents Motion for Leave to Adduce Additional Evidence, Subject VII, comparative cost of truck and rail delivery, R. 16579, and Subject VIII, Comparative cost of rail and water delivery, R. 16580. We press these parts of that motion. See argument at p. 240 below.

[15] As to water rates, see Motion for Leave to Adduce, note 14 *supra*, and also App. III, 1712-13, 1716-17, 1719-21, 1722-23. As to truck rates, see Motion for Leave to Adduce, note 14 *supra*, and also App. III, 1440-42, 1444, 1449-50.

[16] As to water rates, see App. III, 1706, 1710-11, 1716-17, 1719. As to truck rates, see App. III, 1440-42, 1444-48.

[17] Fdg. 23 (b), R. 16126; Fdg. 26, R. 16131, Statement of Points, Nos. 33 and 36, R. 16278, 16279. Fdg. 23 (b) is merely the Commission's effort to explain figures in the table quoted in that finding and is not a finding based on evidence. Fdg. 26 is a statement of the Commission's conclusion.

The evidence shows an increase of water-borne cement tonnage from 274,731 tons in 1919 to 1,476,566 tons in 1935;[18] it shows a great variety of experience by mills on or near waterways with available water transportation facilities with respect to possible savings in cost of delivery;[19] and it shows that with trifling exceptions any savings in cost of delivery are reflected in the delivered price quoted or are made available by the quotation of f.o.b. mill prices.[20] It shows further that the savings effected by Huron's extensive system of water delivery of bulk cement to silos on the Great Lakes have been reflected in lower prices in this large area than elsewhere.[21] The Commission has made no findings on any of this undisputed evidence and there is no evidence of any concert of action of any sort on this subject. In fact the evidence shows a great diversity of experience and practice with respect to water transportation in this industry.[22]

As to truck transportation we have dealt with the findings on this subject above, pages 160 to 180. The Commission's "flagrant example" in its brief, pages 108-109, of Huron's supposed practice of delivering cement to purchasers' trucks at the mill but exacting a price that included rail freight to the point to which the buyer intended to truck is not supported by reference to any finding. There is no such finding.[23]

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[18] App. III, 1705-06, 1736-38.

[19] App. III, 1706-25.

[20] App. III, 1726-35.

[21] App. III, 1707-08.

[22] App. III, 1705-32.

[23] The record citations on p. 101 of the Commission's brief do not support the broad statement in the text. Thus, R. 9903 does not deal with this subject and R. 9879-80, 9954 show that at one

We turn now to the legality of the pricing practices of the few non-base mills in this industry individually considered. The lower court properly held that the pricing practices of the non-base mills were no part of the Commission's formula definition (R. 16792).[24]

We note at this point again the finding in Par. 7 (b) (R. 15988-89) that a non-base mill is free to change its status at any time and become a base mill "for reasons its management considers sufficient". It is free to do so and always has been. Many have done so long prior to the decisions of this Court in the *Corn Products* and *Staley* cases and long prior to the decision of the court below[25] in which Judge Major stated that the Commission was free to proceed against these mills (R. 16792). We do not concede that the practices of these mills amount to price discrimination in violation of Section 2 of the Clayton Act, as amended. We do not argue the point because the sole issue in this case as to these mills is whether these price followers are conspirators with the leaders they follow. See our argument at pages 108 to 109 above.

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time Huron sold by truck at delivered prices with truck delivery cost prepaid but at the same time permitted dealers to load amounts less than the minimum of 60 barrels that Huron would deliver in its own trucks. This was a matter of convenience to dealers as Huron warehoused the cement and loaded it on dealers' trucks. See Com. Ex. 422-O, being Huron's announcement dated March 10, 1933.

[24] At the oral argument, as the lower court stated, Commission counsel when confronted with the conceded fact that all of the Pacific Coast respondents are base mills and collect no phantom freight, stated: "I contend, and I shall show a few minutes later, that the existence of phantom freight is not a necessary element in the multiple basing point system at all" (R. 16798).

[25] Evidence on this point will be found in App. I, 355-398, 371-484. See also the five charts at App. I, 364-368 showing the spread of base mills throughout the country in 1915, 1920, 1925, 1937 and 1940.

VI. The Commission committed prejudicial error in the reception and rejection of evidence and the use of incompetent evidence as support for important findings, in the blanket denial of respondents' motions to limit testimony and exhibits, and in the exclusion of material evidence offered by respondents.[1]

A. The Abandonment of Judicial Standards by the Commission and the Denial of Respondents' Motions to Limit.

We do not contest the right of the Commission, within limits, to relax the strict requirements of rules of evidence in its proceedings. But, as this Court has long since said, in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88 (1913):

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended" (at p. 93).

We have already pointed out the improper use by the Commission of the ancient background evidence, the NRA evidence and economic testimony as proof of and as the basis for findings of the conspiracy charged (see pp. 26-41, 146, *supra*).

There remains to be considered other evidence received and relied upon by the Commission to demonstrate the extent to which proper judicial and administrative

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[1] In their Statement of Points respondents made detailed assignments of error respecting each of the specific errors committed by the Commission in the conduct of the proceedings and upon which respondents relied in the court below and rely in this court (see Nos. 38 through 46, R. 16279-89). Respondents also moved to adduce the rejected evidence. R. 16551-16635. This motion was denied in the Court of Appeals. R. 16816.

standards were abandoned in this proceeding from the outset. The Court of Appeals referred only to one aspect of this when it considered the "Treanor letter" at some length in its opinion. There were, however, many others, as the Court stated (R. 16779). So that the Treanor letter may be considered in its proper setting—the general conduct of the proceedings by the Commission—we shall mention some of the other matters first.

The Commission's direct case consisted of 22,000 pages of the testimony of 173 witnesses, together with over 25,000 pages of exhibits. None of this evidence was limited with respect to any issue or with respect to any respondent. It was all received by the Trial Examiner with comments such as the following, which is typical:

> "Examiner Norwood: As I understand it, this is to throw light upon all these transactions, and the reasons behind them. It will all be considered for that or for some other material purposes. If it is not connected up with any particular client or class of respondents here, why, of course, it can be stricken." (Tr. 1113-14)

Most of the exhibits were identified and received in evidence in bundles containing hundreds of papers.[2] Many of them were writings of deceased persons.[3] Many of them were memoranda or letters passing between third parties; in some instances the third parties were not only not presented as witnesses but in most cases were unidentified, dead, or otherwise unavailable.[4] Illustrative is the series

[2] See e.g. Statement of Points No. 40(a)(1) and Appendix B thereto, Sec. II, R. 16284-85, 16304-13.

[3] See e.g. Statement of Points No. 40(b)(c), R. 16285-86.

[4] See e.g. Statement of Points No. 40(c)(d), R. 16286.

of 46 letters and memoranda relating to truck delivery of cement which passed between railroad executives and dealers, all of whom were third parties in every sense of that term. The utter worthlessness of these exhibits as evidence and their improper use by the Commission has already been argued, *supra*.[5]

When the Commission closed its case the issues which had been reasonably defined by the complaint had been so multiplied and confused that there were no longer any issues in any judicial or administrative sense. The respondents as a consequence were faced with a "case" against them which had no limits either as to subject matter, as to time or as to their alleged individual connection with any or all of it. Early in the case, when some indication of the scope of the fundamental charge of conspiracy was requested, counsel for the Commission stated on the record: "There is no limit as to time that the thing [the conspiracy] can be traced back * * * I do not care whether it is twenty years * * *" (R. 2210).[6]

In an attempt to bring some order out of this chaotic record so that the respondents in producing their evidence might be apprised of the issues as well as the particular evidence which each would be required to meet, detailed and specific motions to strike and limit itemized testimony and exhibits were made separately on behalf of each of the 75 corporate respondents, The Cement Institute and its officers and trustees at the close of the Commission's case.[7] The motion to limit was denied in toto. Thirty-

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[5] *Supra*, pp. 173-177.

[6] As already noted, in the Circuit Court the Commission abandoned this view and relies only upon a conspiracy said to have begun in August, 1929 (see p. 3, *supra*).

[7] R. 317-320, 6553 *et seq.*; Resp. Exs. 385-395.

six exhibits were stricken on the basis of the motion to strike.[8] Everything else, therefore, was, in the language of the Trial Examiner, deemed to be "connected up".

It was error for the Commission to shift to the respondents the burden of guessing at their peril what evidence in the Commission's voluminous direct case was material, what were the issues they had to meet, what evidence the Commission considered material to those issues, and by what evidence they individually were to be bound. *Cf. Kotteakos* v. *United States*, 328 U. S. 750, 773-775 (1946). And the Commission has not corrected the error by its findings for there, too, is reflected the same attitude of easy generality whereby all "respondents" are everywhere assumed to be, but nowhere found to be, connected with the various acts and practices covered.[9]

The theory of the Commission throughout has been that any respondent who is shown to have participated in any collective activity, however lawful, is necessarily a participant in the alleged conspiracy. As the court below pointed out (R. 16770, 16773, 16781-82, 16783), the Commission failed to indicate in its findings which, if any, of the respondents had been shown by the evidence to be connected with all or any of its extensive findings. Instead, the findings refer to "respondents" generally or "a number of the respondents" or "some respondents" or "a few respondents" or "producers" or "the cement industry and its members" and similar vague and indefinite generalities.[10] The Commission's attitude was characterized by the state-

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[8] R. 321-322.

[9] See p. 17, *supra*.

[10] See particularly Fdgs. 6 (a), R. 15983-84.

ment of counsel for the Commission before the court below that

> "* * * to seriously and formally take the position, as petitioners do, that such a vast record * * * contains no substantial evidence to support the Commission's Findings of Fact, where coupled with the enormity of the task that petitioners thus ask the Court to assume, is patently unreasonable and absurd."[11]

There is an admission that the Commission has sought to overwhelm these respondents—and then to overwhelm the reviewing court—by the sheer volume of its "evidence". We submit that the administrative process requires something more.

B. The Commission Improperly Rejected Material Evidence Offered by Respondents Respecting Matters which are the Subject of the Commission's Findings.

In testing the admissibility of the Commission's proffers of evidence the Trial Examiner's attitude was expressed as follows:

> "Examiner Norwood: I cannot split hairs on the exhibits. There is a vast number of them coming in here, and I do not know but what in my consideration, I may not discard vast numbers of them. Unless its irrelevancy appears very clearly, I am going to receive them" (R. 846).

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[11] Statement in Partial and Conditional Opposition to Petitioners' Motions for Various Extensions of Time, page 4. Similar logic underlies the counterpart of this argument which appears in the Commission's brief filed in this Court, wherein it is now claimed that since the complaint charged a combination and the order is based upon combination, that the Commission must have intended to make a finding of the combination upon which its order is based and that this intention must be read into the findings as a substitute for an actual finding (Com. Br., pp. 31, 62-63).

The admissibility of respondents' evidence, however, was determined by a quite different test. Thus the Trial Examiner, curtailing respondents' cross examination early in the case, ruled:

> "Trial Examiner Norwood: Well, we have come to the point where we cannot spend the time on receiving any more testimony unless it has some direct connection with the issues in the case or evidence that had been introduced here against you. That is all you have to meet, anyway.
>
> Now, this irrelevant information here, while it might be very interesting we cannot take it unless you can show me clearly where it connects up in some way with the issues or with the evidence that has been introduced against you" (R. 9158).

And subsequently:

> "I think it is Counsel's duty either to point out to me the relevancy under the issues or point out to me what evidence it is intended to meet, one of the two" (R. 9171).

As a result of the changed attitude of the Examiner in receiving respondents' evidence, over 1300 exhibits and a considerable body of testimony offered or attempted to be offered by respondents to meet evidence received against them by the Commission were excluded. In the review proceedings below respondents assigned error to the exclusion of this evidence,[12] and in order to preserve that assignment of error for review, moved the Court of Appeals to adduce typical portions of this evidence consisting of 200 of the excluded exhibits together with related testimony and offers

[12] Statement of Points No. 39, R. 16280-84.

of proof.[13] That motion was denied by the court below (R. 16816, 16757) for the reason we judge that it did not reach the questions thereby presented. We save and discuss the point here only should this Court reach these questions.

The materiality of the rejected evidence and its bearing upon matters which are the subject of the findings is presented fully in the moving affidavit and appendices thereto filed in support of respondents' motion (R. 16560-16635).

The Commission in its answer to the motion conceded certain facts which made it unnecessary for respondents to press certain portions of the motion.[14]

Accordingly, respondents' assignments of error respecting excluded evidence and the motion to adduce were pressed only with respect to the following subjects:

1. Evidence of f.o.b. mill bids and sales by specific respondents. (Motion, Subj. II, R. 16570-73. The related evidence on the subject is digested in App. II, 929-70).

2. Dealer opposition to and disapproval of delivery of cement to customers' trucks at the mill and comparative cost of truck and rail delivery. (Motion, Subj. VI and VII, R. 16577-79. The related evidence on the subject is digested in App. III, 1441, 1444, 1449, 1450, 1644, 1656; see pp. 1439-50, pp. 1625-67).

3. The comparative cost of water and rail delivery. Motion, Subj. VIII, R. 16580. The related evidence on the subject is digested in App. III, 1705-38).

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[13] Motion for Leave to Adduce Additional Evidence (R. 16551-16635).

[14] The concessions apply to the following as accepted in respondents' Reply to the Commission's Answer to the Motion: Subject II (in part) R. 16701-02; Subject III, R. 16702; Subject V, R. 16703; Subject X, R. 16706; and Subject XIII (2) and (3) R. 16707.

4. The reasonableness of shipment distances and cross-hauling by some respondents. (Motion, Subj. XI, R. 16582-83. The related evidence on the subject is digested in App. I, 87-96.)

5. The fairness of cement prices. This evidence was offered to meet specific charges which permeate the complaint[15] and which are reflected in the Commission's findings. Thus, we are told in the findings that the effect of respondents' pricing methods is to maintain "artificial and monopolistic * * * prices."[16] The same point is made in the Commission's brief (pp. 23, 24). To rebut these charges and as further proof of the absence of the conspiracy charged, respondents offered a comprehensive and detailed survey of prices, costs and profits by Messrs. Price, Waterhouse & Company and Ford, Bacon & Davis which showed that average earnings of the respondents over the ten year period, 1928 to 1937 inclusive, were less than 3%—not on capital stock, but on the actual cost of assets used in the manufacture of cement. This evidence was rejected. It is recounted in full in a detailed offer of proof, R. 14886-87, 14890-14908, 14911, 14916-19. See motion to Adduce Additional Evidence Subj. XIV, R. 16587-95.

The denial to the respondents of the right to meet and neutralize evidence offered against them on the foregoing material matters was error. *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 301-02 (1937).

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[15] See Pars. 8 (c) R. 186; 8 (g)(i) R. 188; 8 (j) R. 189; 11, R. 213.

[16] Fdg., Par. 26, R. 16131. See also Fdgs., Pars. 23 (c) R. 16126, 22 (c) R. 16123-24, 23 (e) R. 16126-27, 15 (a) R. 16071.

C. The Treanor Letter.

The Commission's reliance upon the Treanor letter (Com. Ex. 7) for any purpose was predicated upon misstatements of the evidence as well as on error of law. The Commission recites portions of this letter in its Fdgs. 7 (r) and 21 (f) (R. 16004-05, 16120). The majority opinion below correctly stated the evidence and the applicable law (R. 16779-81). To reargue those points here would, we think, further unduly exaggerate the importance of this letter. It should be pointed out, however, that the reference to the Treanor letter in the dissenting opinion of Judge Evans below, is predicated upon an apparent misconception of the facts. At the outset Judge Evans states:

> "* * * there was received in evidence a letter from Mr. John Treanor to officers of respondents and members of the Institute's board and associates on the Code Authority * * *." (R. 16820)

This statement is contrary to the evidence. Treanor's letter was not sent "to officers of respondents and members of the Institute's board and associates on the Code Authority." Treanor addressed his letter to Rader, who was Chairman of the Code Authority and stated as the basis for his views, the following:

> "As a member of this industry, my fate is to a considerable extent in your hands, so that I have both a right and a duty to let you know my views." (Com. Ex. 7; App. IV, 2920)

If there were no other evidence, this alone makes it clear that Treanor as President of Riverside Cement Company was writing to Rader, in his capacity as Chairman of the N. R. A. Code Authority as a single member of the

cement industry respecting action which had been taken by the N. R. A. Code Authority for the cement industry.[1]

Treanor sent copies of his letter to eight other individuals who were associated with him on a recently appointed group to study the industry's public relations and to the President of the P. C. A., who was also participating in that work.[2] Treanor's letter was written as president of his company, not as a Trustee of the Institute, and was not sent by him or by Rader to the other twenty-one members of the then Board of Trustees of the Institute (Com. Ex. 620A). Rader reproduced it and sent it to the then seven members of the Code Authority, and to no one else (App. III, 2118-19; Com. Ex. 7C).

Returning to Judge Evans, he states that Treanor's "statement was an admission of a party to *a* conspiracy made *during pendency of the litigation*" (italics ours) (R. 16820). But Treanor was *not* a party to the case; he was a former president (deceased at the time of the institution of the proceedings) of the respondent Riverside (R. 16780). His admission therefore was in the category of a vicarious admission. It would only have been an admission against the companies other than Riverside if it were written as part of the Institute's business to In-

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[1] The Commission's brief urges that Treanor's "state of mind" provides "appropriate background evidence" for this proceeding (Com. Br., p. 89). If so, we suggest that the repeated use of an excerpt from one letter in the findings and in the Commission's arguments in support of them (pp. 33, 48-49, 87-88, and see opinion of the Court below, R. 16779-80) is better calculated to provide "atmosphere" than "background". We make no apologies for Treanor's views expressed in his many writings which are in the record if they are read together and in context and in the setting wherein they occurred. The letters and the complete story are set out in App. IV, 2919-25; App. III, 2056-88.

[2] App. III, 2032-33; Com. Ex. 571 R, S.

stitute trustees. The evidence plainly shows that it was not.[3]

We do not understand Judge Evans' reference to "pendency of the litigation" (R. 16820), since the letter was dated in May 1934 and the complaint here was filed in July of 1937.

VII. The Order to Cease and Desist Should Be Set Aside

A. The Order Exceeds the Jurisdiction of the Commission

We rely upon the argument in the brief of respondent Marquette Cement Manufacturing Company, Case No. 25, in support of this point and in reply to the argument in the Commission's brief pages 38-41.

B. The Court Below Properly Construed the Objective of the Commission in this Proceeding and the Effect of Its Order.

In the final analysis this case will determine the legality of delivered prices which involve so-called "freight absorption".

The court below correctly stated that the order made it plain that it is "the purpose of the Commission to require each producer to sell cement on an f.o.b. mill price basis" (R. 16769). Judge Major reviewed this phase of the case carefully[1] to clarify "a somewhat confused situation as to the precise objective of this proceeding" (R. 16768).

The confusion is confounded in the Commission's brief in this Court. In the court below, Judge Major quoted from the Commission's brief to show that the Commission in

[3] App. II, 676-682.

[1] R. 16767-69.

effect conceded that it was its purpose to prohibit each individual respondent from absorbing freight even though done in good faith to meet an equally low price of a competitor and to require each respondent to sell on an f.o.b. mill basis (R. 16769).

The Commission in its brief in this Court changes its position in an obvious attempt to discredit the court below and now insists that the order *by its terms* is directed only against agreement to do the prohibited acts (Com. Br., pp. 120-122: with this we agree) and that under it each producer may continue to absorb freight provided he acts individually (Com. Br., p. 122). If the Commission's brief stopped at that point we would have no quarrel with it. Confusion is confounded, however, by the extraordinary qualification to this basic right of each producer under the Clayton Act, as amended, that is stated on page 122 of the Commission's brief. The qualification is:

> "—provided he acts individually and with that variability in action respecting particular competitive situations which is characteristic of genuine competitive endeavor and a free market—"

We had supposed until now that when the Clayton Act in its proviso permitted a seller to quote a lower price in good faith "to meet" an equally low price of a competitor that a seller might do this, if he so desired, at any time. We had never supposed that a sales executive was required to have an economist at his side to advise him whether his conduct adequately reflected "that variability in action etc." that the Commission now insists his conduct must show in order to avoid prosecution under the Clayton Act or contempt proceedings under an order such as this.

In short, we submit that the extraordinary words quoted above do not change the objective of the Commission in this proceeding, an objective that the court below found was conceded in the Commission's brief below,[2] that has been stated by Commission counsel before Congressional committees[3] and that is reflected in the theory urged before this Court that the so-called multiple basing point system is illegal "whether or not there is a combination * * * to use this pricing system"[4].

We submit that the Commission's thesis of conspiracy in this case rests upon the identical theories that, after careful consideration, have been thrice rejected by the Congress.[5] We respectfully ask this Court to reject them not because they are theories—but because they are contrary to law and the evidence in this record.

C. The Order is Unlawful in that in Many Particulars it Does Not Provide Any Proper Standard by Which Respondents Can Reasonably be Expected to be Governed in the Conduct of Their Affairs and in Some Respects It Goes Beyond Matters Charged in the Complaint and Found in the Findings.[1]

If this Court should hold that the order should be affirmed we submit that it is objectionable in the following particulars.

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[2] R. 16769.

[3] See footnote 3, p. 143, *supra*.

[4] Commission brief, p. 38. See our argument on this point, pp. 142 to 146 above.

[5] S. 4055, 74th Congress, the so-called Anti Basing Point bill failed of passage. The definition of price as "mill net" in the Robinson-Patman bill was rejected by Congress. The Commission's appeal to the T. N. E. C. (*supra*) has been ignored by Congress.

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[1] Statement of Points Nos. 3 (a) (b) (c), 4 (a) (b) (c) (g), 8 (a) (b) (c), R. 16234-37.

Many of the phrases and paragraphs in the order are defective and should be stricken, set aside or clarified by this Court because they do not provide any proper standard by which these respondents may conduct their affairs and they go beyond matters charged in the complaint and found in the findings. As to the importance of plain language in an administrative order, this Court recently said:

> "It is regrettable that prolonged litigations should have resulted because of the absence from the Commission's order of a sentence more precisely defining its scope, or of a clarifying order which could have been entered at any stage of the pending litigations." (*Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675, 685 (1943).)

We turn now to the objectionable phrases and paragraphs of this Order.

1. The preamble provides that the named respondents:

> "* * * do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any *planned common course of action*, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents *and others not parties hereto*, to do or perform any of the following things: * * *." (R. 16135; italics ours)

First, we urge that the phrase "planned common course of action" be stricken. These words add only verbosity to the preamble and do not add anything to the words that follow: "understanding, agreement, combination, or conspiracy." The four words last quoted should be ample to satisfy the Commission's purpose. If the challenged phrase

does add something, then the Commission should be required to state what this novel phrase means in this order and what it adds to the four words.

Second, we urge that the phrase "and others not parties hereto" be stricken. The reach of this phrase as now written has no limit. The Commission should have specified what "others" are included. In the words of the Court of Appeals for the Seventh Circuit in *Salt Producers Ass'n. v. Federal Trade Commission,* 134 F. (2d) 354 (1943):

> "It is, however, of the utmost importance that the petitioners know exactly what they are prohibited from doing, for their failure to comply, subjects them to punishment for contempt, which punishment should, and doubtless will be, substantial. Petitioners must know definitely what the enforcement order prohibits them from doing." (at page 360)

If it is of the utmost importance to the respondents named in the order to know exactly what they are prohibited from doing, then we submit that it is also of the utmost importance that the "others" be specified. Their failure to comply subjects them, too, to punishment for contempt if this order stands.

2. Paragraph 1 prohibits:

> "1. Quoting or selling cement at prices calculated or determined pursuant to or in accordance with the multiple basing-point delivered-price system; *or quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any ad-*

vantage in price in dealing with one or more of the respondents against any of the other respondents." (R. 16135; italics ours)

First, we submit that if this order is sustained, the phrase "the multiple basing point delivered-price system" be clarified by the addition of a proviso that will make it clear "that such enforcement order does not invade any legal rights which are theirs, when separated from the illegal conspiracy," *Salt Producers Ass'n. v. Federal Trade Commission*, 134 F. (2d) 354, 360 (C. C. A. 7th, 1943); see also *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 410 (1945). Among the legal rights which respondents now have are the right to sell cement at delivered prices when due allowance is made for differences in the cost of delivery and the right to make lower prices in good faith to meet an equally low price of a competitor, all as permitted under the provisions of the Clayton Act, as amended. And such proviso should include any other legal rights which respondents now have or hereafter may have at common law and under the provisions of any applicable law, federal or state.

Second, we submit that the part of this paragraph italicized above be stricken. It lacks entirely the necessary definiteness to inform respondents what they are prohibited from doing and clarification, by the very character of the paragraph, is impossible. Neither the complaint nor the findings deal with "any other plan or system" so that this paragraph must be stricken as going beyond both, *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (1920); *Securities and Exchange Commission* v. *Chenery Corporation, et al.*, 318 U. S. 80, 86-88, 92-95 (1943); *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 410 (1945).

And when the order purports to reach any situation "which prevents purchasers from finding any advantage in price * * *" etc., does this mean that respondents might be cited for contempt if, in the exercise of their right to meet competition, one or more respondents met a lower price quoted by a competitor, so that the purchaser could find no price advantage as between them? If this portion of the order reaches this situation then it should be stricken. If it does not reach it, then what does it include? All respondents might readily be cited for contempt if they all followed the "plan or system" of meeting competition and if, as a result, uniformity of price occurred at any time and place. The fact that all did this would be used as evidence of agreement to do it.

The importance of the proviso, proposed above, is emphasized.

3. ***The preamble of paragraph 2 reads as follows:***

> "2. In connection with or in aid or support of any plan, system, acts, or practices, prohibited in paragraph 1 above." (R. 16135)

Paragraph 2 of the order refers to what the Commission in the court below termed "acts of implementation" (R. 16769, 16809). As the court below rightly held, the materiality of these matters—and the propriety of an order enjoining them—"depends upon the establishment of the conspiracy alleged" (R. 16809). This entire paragraph must fall if paragraph 1 of the order is not sustained.

If the preamble of the order and paragraph 1 are clarified, as urged above, then we have no objection to the language of the preamble of Paragraph 2. There are sixteen subparagraphs (a) to (p) to Paragraph 2 (R. 16135-37)

and the preamble carries with it all of the objectionable parts of Paragraph 1 as well as of the preamble to the order and applies them to the more specific provisions of each of the sixteen subparagraphs.

4. Paragraphs 2(c) and (d) prohibit:

> "(c) Quoting or selling cement at f.o.b. mill prices calculated by deducting actual common-carrier transportation charges from delivered-price quotations or delivered prices which are equivalent to the sum of the base price at, plus common-carrier transportation charges from, any point other than the actual shipping point.
>
> (d) Quoting or selling cement *ostensibly at f.o.b. mill prices*, but which prices, plus common-carrier transportation charges to purchasers' destinations, are *systematically equivalent* to identical delivered costs to such purchasers from differently located mills." (R. 16135; italics ours)

Subparagraph (d) is surplusage and should be stricken under the rule of *Shakespeare Co.* v. *Federal Trade Commission*, 50 F. (2d) 758, 760 (C. C. A. 6th, 1931), that the Commission may not prohibit something that is prohibited elsewhere in the order. Subparagraph (d) adds only the element of deception implicit in the objectionable words "ostensibly at f.o.b. mill prices." Subparagraph (c) has already prohibited "f.o.b. mill prices calculated by deducting actual common-carrier transportation charges from delivered-price quotations • • •"—apparently any delivered-price quotations, that is, those of the quoting mill or those of any other mill. Subparagraph (d) adds nothing to this.

5. Paragraphs 2(f) and (g) prohibit:

> "(f) Quoting or selling cement at delivered prices which systematically include a common-carrier transportation factor greater or less than the actual cost of such common-carrier transportation from the points of shipment to destination.
>
> (g) Quoting or selling cement at delivered prices which systematically include a freight factor representing transportation by a common carrier having higher rates than the means of transportation actually employed." (R. 16136)

Subparagraph (g) is surplusage and should be stricken for the same reason given in 4, above. It adds nothing to what is already prohibited in (f).

6. Paragraph 2(h) prohibits:

> "(h) Quoting or selling cement at destination-cost figures accompanied by a requirement that for invoicing purposes the f.o.b. mill price shall be determined by making *specified deductions* from said destination cost figures." (R. 16136; italics ours)

The objectionable words here are "specified deductions." What are these? If they are to be limited to deductions of land-grant or other special common-carrier rates to which the Federal Government may be entitled, then the whole of subparagraph (h) is surplusage and should be stricken because the same prohibition is found in specific language in subparagraph (i) that follows it. If it is to be limited to the deduction of common-carrier transportation charges then also it is surplusage and should be stricken because the same prohibition is found in the language of subparagraph (c), quoted in 4, above.

7. Paragraph 4 prohibits:

> "4. Using any means substantially similar to those specifically set out in this order with the purpose or effect of accomplishing any of the things prohibited by this order." (R. 16137)

If the order is modified and clarified in all of the several respects urged by respondents above and in points D, E and F below then we have no objection to the language of Paragraph 4.

If Paragraph 4 stands with Paragraph 1 as now written, then respondents are prohibited from doing anything "substantially similar" to "any other plan or system * * *" etc. And there is not a hint in the language of Paragraph 1 to suggest what "any other plan or system" might be.

D. Paragraph 2 (j) Respecting Freight Rate Information.[1]

This reads as follows:

> "2. In connection with or in aid or support of any plan, system, acts, or practices prohibited in paragraph 1 above.
>
> * * * * *
>
> (j) Collecting, compiling, circulating, or exchanging information concerning common-carrier transportation charges for cement used or to be used as a factor in the price of cement, or using, directly or indirectly, any such information so compiled or received as a factor in the price of cement." (R. 16135, 16136)

[1] Statement of Points No. 5, R. 16236.

We submit that Paragraph 2(j) should be stricken for the reasons given in the argument pages 59-68 above, and particularly on the authority of the first *Cement* case. The Institute freight rate book service was undertaken in reliance on that decision and was at all times carried on in strict conformity with the opinion of this Court in that case.

As Judge Major said in the court below "they are • • • within the legal sphere of a trade association as held in the old *Cement* case" (R. 16772).

Until the present attack on it by the Commission, the authority of that decision on this or any other points has never been questioned.

In addition, the language of subparagraph (j) is objectionable. It prohibits, in the disjunctive, the "collecting, compiling, circulating, *or* exchanging" of such information. This proceeding deals with the collection, compilation, circulation *and* exchange among respondents of such information prepared by a central agency, the Institute. We submit that if this order is affirmed and thereafter each or any of the respondents individually compiles its own freight rate information—a necessary step in the sale of cement at delivered prices as this Court held in the first *Cement* case (268 U. S. 588 at p. 597)—this Commission may use the books so prepared as evidence that they were compiled pursuant to an agreement and charge those respondents with contempt of the order. The type of proof relied upon by the Commission in this proceeding furnishes adequate basis for this belief.

E. Paragraph 2 (n) Respecting Statistical Data.[1]

This reads as follows:

> "2. In connection with or in aid or support of any plan, system, acts, or practices prohibited in paragraph 1 above.
>
> • • • • •
>
> (n) Collecting, compiling and circulating, or exchanging statistical data which reveal the individual production, stocks, sales, or shipments of cement of any corporate respondent to other corporate respondents." (R. 16135, 16136)

We submit that Paragraph 2(n) should be stricken for the reasons given in the argument, pages 201-207 above, and particularly on the authority of the first *Cement* case. Like the freight rate book service, the Institute statistical service was undertaken and carried on in reliance on and in strict conformity with that decision and the court below so found (R. 16772). Until now the authority of that decision has never been questioned.

F. Paragraph 3 Respecting Price Discrimination.[1]

Paragraph 3 is one of the "things" referred to in the preamble and prohibits:

> "3. *Discriminating in price* between or among their respective customers by *systematically* charging and accepting *mill net prices* which differ by the amounts necessary to produce delivered costs to purchasers identical with delivered costs available to such purchasers through purchases from other respondents." (R. 16137; italics ours)

[1] Statement of Points Nos. 3 (e), 6, R. 16235, 16236-37.

[1] Statement of Points Nos. 1, 4 (f), 7, R. 16234, 16236-37.

The argument that is made, at pages 248-250 above, with respect to Paragraph 1 applies with even greater force to Paragraph 3. This paragraph takes no account of the right that each respondent has to sell cement at delivered prices when due allowance is made for differences in the cost of delivery and to make lower prices in good faith to meet an equally low price of a competitor, all as now permitted under the provisions of the Clayton Act, as amended. Again, we insist that a proviso be added that will put beyond any question the right of these respondents, acting independently and without agreement, to compete and meet competition in the sale of cement. See page 249, *supra*.

The importance of this proviso is shown also by the objectionable words in Paragraph 3. We urge that the word "systematically" be stricken. What does it mean in this context? For example, if a base mill in the exercise of its right to meet competition must absorb freight to quote a lower price to meet an equally low price of a competitor and if it does this whenever the occasion presents itself and if all base mills do this, is this evidence of agreement and would all of these mills be cited for contempt? Is this doing something "systematically"? Is meeting competition a "systematic" procedure in marketing?

The court below summed up the likely effects of this part of the order when it considered the Commission's findings in Par. 23 on the subject, as follows:

> "The finding continues: 'Each mill shrinks its mill net by the amount necessary for it to match the delivered prices established pursuant to the aforesaid pricing system.' This is high sounding language, perhaps consistent with economic thinking, but in reality it means nothing more or less than that each

> mill reduces its mill net by the amount necessary to enable it to meet the delivered price of a competitor in territory where it is at a disadvantage freightwise. To state the situation realistically is of no benefit to the Commission's cause; in fact, the situation so stated brings the Commission in conflict not only with what was said and held in the old Cement case but with Sec. 2(b) of the Clayton Act which provides, 'that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *'." (R. 16795)

The words "mill net prices" in this part of the order are also objectionable. What are these prices? Do they differ from "f.o.b. mill prices" that are dealt with in Paragraphs 2(c), (d) and (h)? If they are the same then "mill net prices" should be stricken and "f.o.b. mill prices" substituted. If they are different, then what is the difference? In earlier paragraphs the order deals with "quoting or selling cement at delivered prices" and "quoting or selling cement at f.o.b. mill prices". In Paragraph 3, for the first time, the new and uncertain words "mill net prices" are introduced.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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APPENDIX B

Finding Par. No.	Record Pages	Subject Matter of Finding	Statement of Points Record Pages	Commission's Brief Pages	Resp's. Brief Pages[1]	App. A to Resp's Brief Pages
One	15962-79	Respondents	16240	6, 11, 65, 93, 94	1	Vol. I, 5-16, Vol. III, 1808-1817, Chart X-B, p. 1800, Vol. IV, 2810-12, 2739-42, 2856-57, 2752-55, 2673-78, 2313, 2733-34
Two	15979-80	Interstate Commerce	16240-41			
Three	15980-81	Product & its uses	16241-42	9, 10	9-12, 56	Vol. I, 17-20, 32-47, 51-68, 89-96, Chart I-D, p. 52, Vol. IV, 2673-76, 2752-55, 2814, 2852-56
Four	15981-82	Company grouping and interrelationship	16242	10, 11, 60, 94	**43**	Vol. I, 42, 47-51
Five	15983	Trade Associations	16239, 16243-46	10, 60	26, **33**	Vol. III, 1779-95, 2118-22, 1806, Vol. IV, 2749-51
Six	15983-88	Co-operative Activities	16239, 16246-47	12, 44, 60, 72, 91	23, **24**, 26, **47**, 130, 145, 237	Vol. IV, 2915-17, 2919-25, 2952-62, 2927-37, 2885-87, 2937-44, Vol. I, 317-335, 254-268
Seven (a)	15988	Sales at delivered prices by use of a formula	16247	17, 42, 98	**85**, 103, 104, 110, 113	Vol. I, 130-134, 167-170, 176-203
(b)	15988-89	Status of Mills	16247	17, 18, 60, 111	**24**, **88**, 103, 109, 133, 233	Vol. I, 361-363, 390-398, Chart II-H, p. 368, Vol. IV, 2945-52
(c)	15989	Non-base mills	16248	17, 94?	109, **110**	Vol. I, 398-409, 445-456
(d)	15989	Bases at non-producing points, Group Bases	16248	94?	9, 109, **111**, 229	Vol. I, 411-412, 425-445, 576-581, Chart II-I, p. 562
(e)	15989	Dual Bases	16248	18, 47, 94?	109, **111**	Vol. I, 549-556
(f)	15989-91	Description of System	16248	94?	109	Vol. I, 409-425, 335-351
(g)	15991	The formula illustrated	16248		104, **227**	Vol. I, Chart II-A, p. 350
(h)	15991	The formula is self-perpetuating	16248	19, 42, 66	19, 22, 23, 104, 110	Vol. I, 97-130, 351-361
(i)	15992-96	Background of concerted action	16239, 16248-51	19, 60	27, 110	Vol. I, 139-150, Vol. III, 1779-87
(j)	15996-97	The License Agreement	16239, 16251	19	27, 110	Vol. I, 134-139, Vol. III, 1790-94
(k)	15997	Extension of System	16239, 16251	19	27, 110	Vol. I, 150-159
(l)	15997-99	Extension into West	16251-52	19	110	Vol. I, 245-249
(m)	16000	Extension into Calif.	16252	19, 98, 102	104, 110	Vol. IV, 2682-88, 2814-26
(n)	16000	Extension into Wash.	16252	19, 94?, 103	**44**, 110	Vol. IV, 2756-59
(o)	16000-01	Purpose of Institute	16252	19, 20, 65, 94	**44**, **45**, **49**, **50**, **54-56**, **59**, 110	Vol. III, 1797-1812, 1825, 1835, 1837, 1841, 1850, 1757
(p)	16001-03	System under N.R.A.	16239, 16252-53	19, 88, 94	**31**, **33**, **45**, 110	Vol. II, 631-640, Vol. III, 1816-18, 2099-2103, 1757-61, 1889-90, Vol. IV, 2562-63
(q)	16003-04	System after N.R.A.	16239, 16253	19, 83, 84, 94	**35**, **45**, **75**, **76**, 110	Vol. II, 692-699, 713-715, Vol. III, 1831, 1834-35, 1850-73, 1760-61, Vol. IV, 2801-02, 2564-67
(r)	16004-06	Resistance to f.o.b. mill selling	16239, 16253-54	19, 29, 57, 86, 87	31, **33**, 110, **114**, **119**, **242**	Vol. I, 170-176, Vol. II, 652-658, 676-687, 727-749, 918-956, Chart IV-A, p. 702, Chart IV-C, p. 874, Vol. IV, 2696, 2704, 2784-93, 2832-42, 2919-22

[1]Bold faced type are references to main argument, regular type to mentions.

APPENDIX B

Finding Par. No.	Record Pages	Subject Matter of Finding	Statement of Points Record Pages	Commission's Brief Pages	Resp's. Brief Pages[1]	App. A to Resp's Brief Pages
Eight (a)-(g)	16006-13	Freight rate service	16239, 16254-56	20, 43, 70-71, 94*	27, **45, 59-61**, 62, **65-67**	Vol. II, 997-1132, Vol. IV, 2742-43, 2769-71, 2851
(h)-(o)	16013-22	Land grant rates	16239, 16256-58	21, 58, 71, 94*, 100	23, **45**, 59, **67, 118**, 137	Vol. II, 1132-1154, 752-816, 817-868, Vol. IV, 2743-46, 2713-21, 2857-71
Nine	16023-29	Identical bids	16239, 16258-60	9, 12-15, 19, 43, 45, 51, 71, 92	**24, 47**, 102, 103, 106, 125, **126, 127**, 128, 129, 227	Vol. I, 203-317, Vol. II, 701-712, 716-727, 869-918, 617-699, 991-995, Vol. I, 456-470, 557-576, 581-599, Vol. IV, 2771-74, 2689-98, 2777-84, 2679-82, 2829-32, 2759-69, 2704-08
Ten	16029-45	Punitive Bases	16239, 16260-61	21, 72-74, 75?, 101	**33, 46, 120, 123, 124, 125**	Vol. I, 484-549, Vol. IV, 2918-19, Vol. I, 603-615, Vol. III, 2167-2245
Eleven	16045-55	Trucking	16239, 16261-62	21, 74-76**, 83, 101	14, 23, **33, 161, 162, 167, 170, 172, 173, 175, 179**	Vol. III, 1401-1703, 1858-59, Vol. IV, 2616-17, 2708, 2727-33, 2794-2800, 2845-50
Twelve	16055-59	Diversions	16239, 16262-64	21, 76-78, 83, 94, 106	14, 23, **33, 55, 58**	Vol. III, 1739-1777, Vol. IV, 2595-96, 2591-92, 2601, 2735, 2801-03, 2856
Thirteen	16059-65	Specific Job Contracts	16239, 16264-65	21, 83, 94	23, 27, **33, 68, 69, 71-74**	Vol. III, 1878-1926, 1825, Vol. IV, 2746, 2806-07
Fourteen	16065-71	Terms of Sale	16239, 16265-68	21, 45, 78, 83, 94	27, **33, 181-184**	Vol. I, 146-148, 161-166, Vol. IV, 2804-06, 2559-2621, 2458-72, Vol. III, 1836-38, 1841, 1787-90
Fifteen	16071-82	Statistics	16239, 16268-71	22, 94	14, 23, 28, **34, 205-208, 210-213, 241**	Vol. III, 1927-2011, 2126-28, 2135-37, 2144-51, Vol. I, 159-161, Vol. IV, 2746-47
Sixteen	16082-89	New Plants	16239, 16271-72	22, 87, 94	**36**	Vol. III, 2151-2166, Vol. II, 970-991
Seventeen	16089-99	Dealers	16239, 16272-74	21, 78-79, 83, 94	14, 23, 28, 31, **33, 185, 189, 190, 192, 193, 195-197**	Vol. IV, 2247-2385, 2433-2558, 2871-85
Eighteen	16099-102	Sales for Federal Relief Work	16239, 16274	21, 79-80, 94	14, **198, 199, 201**	Vol. IV, 2385-2433, 2521-24, 2885-2909
Nineteen	16102-04	Foreign Cement	16274-76	21, 47, 80	14, **214, 215**	Vol. IV, 2623-2672, 2735-36, 2808-10, 2852, 2748-49
Twenty	16104-08	Standard Specifications	16239, 16276-77	8, 22, 83	10, 28, **33**, 128	Vol. III, 2039-43, Vol. I, 20-31, Vol. III, 2050-51
Twenty-one	16108-22	Public Relations	16239, 16277	14, 22, 29, 48, 49, 54, 60, 86, 87, 94	14, **216, 242**	Vol. III, 2026-56, 2085-88, 2056-98, Vol. IV, 2919-22, 2749
Twenty-two	16122-24	Economic Testimony	16277-78	16	**21, 146, 147, 241**	Vol. IV, 2963-3096
Twenty-three	16124-27	Discrimination	16278-79	15, 23, 24, 46, 107, 127	217, 219, **227, 231, 241**, 256	Vol. IV, 2995-96, 3019-21, 3081-82, 3039-40, 3034, 2994-95 3040-42, 3072-79, Vol. I, 68-87, 166, 600-615
Twenty-four	16127-30	Definition of Price	16279	24, 25, 64, 104, 105, 106	127, 217, 219, **230**	Vol. IV, 2988-89, 3068-69
Twenty-five	16130-31	Clayton Act	16279	25, 114, 120	217, 219, **224**	Vol. IV, 3096-3112
Twenty-six	16131-32	Conclusion	16279	23, 63, 64	**21, 22, 231, 241**	App. A, supra
Conclusion	16132		16279	25, 62	**246-58**	

[1]Bold faced type are references to main argument, regular type to mentions.
*Fng. 7 (c-f), (n) in fn. 57 should be Fng. 8.
**Fng. 10 on p. 75 should be Fng. 11.

APPENDIX C

The order to cease and desist (R. 16133-37) enjoins respondents:

> "* * * from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:
>
> "1. Quoting or selling cement at prices calculated or determined pursuant to or in accordance with the multiple basing-point delivered-price system; or quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents.
>
> 2. In connection with or in aid or support of any plan, system, acts, or practices prohibited in paragraph 1 above.
>
> (a) Refusing or declining to quote or sell cement at the location of the producing mill at a price effective at such location.
>
> (b) Refusing or declining, when quoting or selling cement at a price effective at the location of the producing mill, to allow purchasers to provide transportation by any means, at any cost, or to any place they may desire.

(c) Quoting or selling cement at f.o.b. mill prices calculated by deducting actual common-carrier transportation charges from delivered-price quotations or delivered prices which are equivalent to the sum of the base price at, plus common-carrier transportation charges from, any point other than the actual shipping point.

(d) Quoting or selling cement ostensibly at f.o.b. mill prices, but which prices, plus common-carrier transportation charges to purchasers' destinations, are systematically equivalent to identical delivered costs to such purchasers from differently located mills.

(e) Quoting or selling cement at delivered prices calculated as or systematically equivalent to the sum of the base price in effect at, plus common-carrier transportation charges from, any point other than the actual shipping point.

(f) Quoting or selling cement at delivered prices which systematically include a common-carrier transportation factor greater or less than the actual cost of such common-carrier transportation from the point of shipment to destination.

(g) Quoting or selling cement at delivered prices which systematically include a freight factor representing transportation by a common carrier having higher rates than the means of transportation actually employed.

(h) Quoting or selling cement at destination-cost figures accompanied by a requirement that for invoicing purposes the f.o.b. mill price shall be determined by making specified deductions from said destination cost figures.

(i) Quoting or selling cement to any instrumentality of the Federal Government in a manner or upon

terms which deprive the Government of all or any part of the benefits of land-grant or other special common-carrier rates to which it may be lawfully entitled.

(j) Collecting, compiling, circulating, or exchanging information concerning common-carrier transportation charges for cement used or to be used as a factor in the price of cement, or using, directly or indirectly, any such information so compiled or received as a factor in the price of cement.

(k) Controlling or attempting to control the destination or use of cement after the acquisition of title thereto by the purchaser.

(l) Determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

(m) Determining upon the projects or types of projects for which, or the purchasers or classes of purchasers to whom, sales of cement will or will not be made directly by respondents.

(n) Collecting, compiling and circulating, or exchanging statistical data which reveal the individual production, stocks, sales, or shipments of cement of any corporate respondent to other corporate respondents.

(o) Maintaining any form of espionage for the purpose of determining whether or not their customers purchase or deal in imported cement; or discontinuing or threatening to discontinue sales of cement to customers because they purchase or deal in imported cement.

(p) Determining upon any discounts, package charges or refunds thereon, or other terms or conditions of sale, or using any discounts, package charges

or refunds thereon, or other terms or conditions of sale so determined.

3. Discriminating in price between or among their respective customers by systematically charging and accepting mill net prices which differ by the amounts necessary to produce delivered costs to purchasers identical with delivered costs available to such purchasers through purchases from other respondents.

4. Using any means substantially similar to those specifically set out in this order with the purpose or effect of accomplishing any of the things prohibited by this order."